***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

Bob Bainnai
3-4-65
7-D-Dec
9:30 am
(2)

JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,854

887

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, et al.,

*Appellees.*

On Appeal from the United States District Court for the District of Columbia

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 18,854

---

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, et al.,

*Appellees.*

---

On Appeal from the United States District Court for the District of Columbia

---

## JOINT APPENDIX

---

# INDEX


| | | Page |
|---|---|---|
| Docket Entries | | 1 |
| Complaint, Filed June 17, 1960 | | 5 |
| Answer, Filed September 27, 1960 | | 6 |
| Pretrial Proceedings, May 17, 1963 | | 7 |
| Excerpts from Transcript of Proceedings, January 23, 1964 | | 10 |
| Witnesses: | Tr. Page | |
| Maggie Lee Buggs | | |
| Direct | 2 | 10 |
| Cross | 37 | 14 |
| Excerpts from Transcript of Proceedings, March 10-13, 1964: | | |
| Maggie L. Buggs | | |
| Direct | 172 | 25 |
| Cross | 194 | 29 |
| Redirect | 417 | 65 |
| Dr. Henry S. Robinson, Jr. | | |
| Direct | 440 | 66 |
| Cross | 448 | 70 |
| Dr. Robert E. Lee | | |
| Direct | 455 | 72 |
| Cross | 470 | 75 |
| Dr. Harvey H. Ammerman | | |
| Direct | 474 | 75 |
| Cross | 492 | 81 |
| Redirect | 504 | 85 |
| Recross | 507 | 86 |
| Dr. James Peter Murphy | | |
| Direct | 507-17 | 92 |
| William H. Deskins | | |
| Cross | 507-85 | 98 |
| Instructions to the Jury - March 13, 1964 | 517 | 107 |

| | Page |
|---|---|
| Defendant's Exhibit No. 6 -- Medical Report of Dr. Robert E. Lee, dated May 29, 1963 | 125 |
| Defendant's Exhibit No. 7 -- Medical Report of Dr. Harvey H. Ammerman, dated May 27, 1963 | 127 |
| Defendant's Requested Instruction No. 5, Filed March 13, 1964 | 129 |
| Defendant's Requested Instruction No. 6, Filed March 13,1964 | 130 |
| Motion for Judgment N.O.V. or for a New Trial or for a Remittitur, Filed March 23, 1964 | 131 |
| Verdict and Judgment, Filed March 13, 1964 | 132 |
| Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion for Judgment N.O.V., for a New Trial or for a Remittitur, Filed April 6, 1964 | 133 |
| Supplemental Memorandum of Points and Authorities in Support of Motion for New Trial, Filed April 9, 1964 | 144 |
| Order Denying Defendant's Motion for Judgment N.O.V., Filed May 19, 1964 | 148 |
| Notice of Appeal, Filed June 10, 1964 | 148 |

# JOINT APPENDIX

---

MAGGIE L. BUGGS
4103 18th Place, N.E.
Washington, D.C.

and

CHARLES W. BUGGS
4103 18th Place, N.E.
Washington, D.C.

Plaintiffs

v.

SAFEWAY STORES, INCORPORATED
A Corporation
1845 4th Street, N.E.
Washington, D.C.

Defendant

Civil Action #1868-60

## DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| **1960** | |
| June 17 | Complaint, appearance jury demand, filed |
| June 17 | Summons, copies (1) and copies (1) of Complaint issued ser. 6-24-60 |
| July 22 | Motion of defts to dismiss; c/m 7-22-60; M.C. 7-22-60; P&A; Appearance of Hogan & Hartson, filed |
| Aug. 3 | Opposition of pltffs to defts motion to dismiss; c/m 8-2-60, filed |
| Sept. 27 | Answer of deft to complaint; c/m 9-27-60, filed |
| Sept. 27 | Calendared (N) |
| **1961** | |
| May 23 | Notice of deft to take deposition of pltff #1; c/m 5-23-61, filed |
| May 26 | Called (Pretrial Examiner) |

| Date | Proceedings |
|---|---|
| **1961** | |
| June 15 | Interrogatories by deft to pltff #1; c/m 6-14-61, filed |
| June 23 | Deposition of pltff #1; 6-12-61 ($47.25 paid by deft) filed |
| Oct. 26 | First notice under Rule 13 |
| Nov. 15 | Motion of pltffs to certify to ready calendar; P&A; c/m 11-14-61; MC 11-15-61, filed |
| **1962** | |
| Jan. 10 | Order certifying cause to ready calendar (AC/N) (N) McGarraghy, J. |
| **1963** | |
| May 17 | Pretrial Proceedings, Pretrial Examiner |
| July 5 | List of witnesses by defendant c/m 7-3-63, filed |
| **1964** | |
| Jan. 23 | Jury sworn and two alternate jurors sworn; trial begun; respited to January 27, 1964. (Rep: Russell Walker) McLaughlin, J. |
| Jan. 27 | Trial resumed; same jury and alternate jurors; mistrial declared; jury discharged; case passed for reassignment. (Rep: Russell Walker) McLaughlin, J. |
| Jan. 27 | Appearance of Richard R. Atkinson as attorney for plaintiff withdrawn. (AC/N) (fiat) McLaughlin, J. |
| Jan. 27 | All exhibits returned to counsel, filed |
| Jan. 28 | Appearance of B. W. Lawson, Jr. and Leroy Nesbitt, as attorneys for plaintiff (AC/N), filed |
| Jan. 31 | Motion of defendant for allowance of fees and expenses as a condition precedent to resetting case, Affidavit, P&A, c/m 1-31-64, MC 1-31-64, filed |
| Feb. 12 | Answer of plaintiffs to motion for allowance of fees and expenses, Affidavit, Exhibit, P&A, c/m 2-12-64, filed |
| Feb. 14 | Order denying motion of defendant for allowance of fees and expenses as Condition Precedent to the Resetting of Case for trial without prejudice. (N) McLaughlin, J. |
| Mar. 9 | Transcript of proceedings of January 23 & 27, 1964, pp. 1-168. (Rep. Walker) (Clerk's copy) filed |

| Date | Proceedings |
|---|---|
| 1964 | |
| Mar. 10 | Jury sworn and two alternate jurors sworn; trial begun; respited to March 11, 1964. (Rep: Robert I. Henderson) McLaughlin, J. |
| Mar. 11 | Trial resumed; same jury and two alternate jurors; trial respited to March 12, 1964. (Rep: Russell Walker) McLaughlin, J. |
| Mar. 12 | Transcript of proceedings pp. 1-8, March 10, 1964, (Rep: R. I. Henderson) Court's copy, filed |
| Mar. 12 | Subpoena duces tecum of defendant, served on The Administrator, Freedmen's Hospital; served March 12, 1964. filed |
| Mar. 12 | Trial resumed; same jury; alternate juror No. 1 absent and excused by court; same No. 2 alternate; trial respited to March 13, 1964. (Rep: Russell Walker) McLaughlin, J. |
| Mar. 13 | Trial resumed; same jury and alternate juror; alternate juror discharged; verdict for plaintiff, Maggie L. Buggs in the sum of nine thousand dollars ($9,000.00) vs. defendant, and for plaintiff, Charles W. Buggs in the sum of two thousand dollars ($2,000.00) vs. defendant (Rep: Russell Walker) McLaughlin, J. |
| Mar. 13 | Verdict and judgment for plaintiff, Maggie L. Buggs in the sum of nine thousand dollars ($9,000.00) vs. defendant and for plaintiff, Charles W. Buggs in the sum of two thousand dollars ($2,000.00) without costs. (N) McLaughlin, J. |
| Mar. 13 | Prayers, filed |
| Mar. 13 | All exhibits returned to counsel, filed |
| Mar. 18 | Motion of defendant to set aside verdict and judgment and award a new trial, P&A's, Exhibit, c/m 3-18-64, MC 3-18-64, filed |
| Mar. 23 | Motion of defendant for new trial or for a remittitur, P&A's, c/m 3-23-64, MC 3-23-64, filed |
| Mar. 24 | Answer of plaintiffs to motion to set aside verdict and judgment and to award a new trial; c/m 3-24-64, filed |
| Mar. 25 | Transcript of Proceedings, March 11 & 12, 1964, Vol IV (pp. 438-507) Clerk's copy (Rep: Russell Walker) filed |
| Mar. 25 | Order denying motion of defendant filed March 18, 1964 to set aside verdict and Judgment and to award a new trial. (N) |

| Date | Proceedings |
|---|---|
| 1964 | |
| Apr. 6 | Opposition of pltff to motion for judgment, N.O.V.; for a new trial or for a remittitur, c/m 4/6/64, filed |
| Apr. 8 | Transcript of proceedings, Vol III, March 11, 1964, pp 338-422; Vol. V, March 12 & 13, 1964, pp. 508-546, (Rep: G. Russell Walker) filed |
| Apr. 9 | Supplementary memorandum of points and Authorities by defendant in support of motion for a new trial; c/m 4-9-64, filed |
| Apr. 17 | Supplemental reply to memorandum of plaintiffs in opposition to motion for new trial, c/m 4-16-64, filed |
| Apr. 20 | Transcript of proceedings Mar. 10, 1964, Vol II, Pages 170-292; (Rep: Henderson) (Clerk's Copy) filed |
| May 15 | Motion for judgment N.O.V. or new trial heard & taken under advisement (Rep. R. Walker) McLaughlin, J. |
| May 19 | Order denying motion for judgment N.O.V. or for a new trial or for a remittitur (N) McLaughlin, J. |
| May 28 | Motion of defendant for allowance of fees and expenses, c/m 5-28-64, MC 5-28-64, filed |
| June 10 | Notice of Appeal by defendant from order of 3-13-64, Copy mailed to W. Lawson, Jr., Deposit $5.00 by Connolly, filed |
| June 26 | Order directing plaintiffs to pay defendant $932.20; enforcement stayed pending termination of the appeal noted June 10, 1964. (N) McLaughlin, J. |
| June 30 | Notice of Appeal by plaintiffs; copy mailed to Paul R. Connolly; Deposit by Lawson, $5.00, filed |
| July 16 | Motion of defendant to extend time to docket record on appeal, filed |
| July 17 | Order extending time within which to docket record on appeal to and including Sept. 8, 1964. (N) McLaughlin, J. |
| July 20 | Transcript of proceedings, Vol. II, pp. 170-292, 3-10-64, Vol. III, pp. 338-422, 3-11-64, Vol. IV, pp. 438-507, 3-12-64; Vol. V, pp. 508-546 |
| July 31 | Transcript of proceedings, pp. 1-168, Jan. 23 & 27, 1964, (Rep: G. Russell Walker) Attorney's copy, filed |
| Aug. 7 | Record on Appeal delivered to U.S.C.A.; Deposit by Belford V. Lawson, Jr. $1.85. |
| Aug. 7 | Receipt from U.S.C.A. for original papers, filed |

[Filed June 17, 1960]

# COMPLAINT

(Personal Injury – Striking Foot Against Platform)

The complaint of plaintiffs named above respectfully shows unto this Honorable Court as follows:

1. That on, to wit, June 11, 1958, the female plaintiff was an invitee of the defendant at it's store on 1730 Hamlin Street, N.E. in the District of Columbia.

2. While an invitee of the defendant at said time and place the female plaintiff in walking down the aisle selecting articles from the shelf, struck her right ankle and foot, violently up and against a vacant, movable platform, the same being a flat top platform that was placed, negligently, at the end of the counter and extending beyond said counter and negligently permitted to remain there without any warning of its presence; resulting in injury to her ankle and foot, requiring medical aid and rendering her unable to pursue her duties; that said injury was caused solely by negligence of defendant, its servants, agents, and/or employees at said time and place.

3. That as a result of the aforesaid negligence, the plaintiff suffered great and grievous mental and physical pain and anguish, was permanently injured and damaged, and has been put to medical and other expense and unable to perform her duties.

4. The husband joins in this action for the loss of consortium of the wife.

WHEREFORE, the plaintiffs demand of and from the defendant the sum of $50,000.00 and the cost of this action.

/s/ Richard R. Atkinson
Attorney for Plaintiffs
626 Third Street, N.W.
DIstrict 7-8000

The plaintiffs demand a jury trial on all issues.

/s/ Richard R. Atkinson
Attorney for Plaintiffs

[Filed Sept. 27, 1960]

## ANSWER

### First Defense

The complaint fails to vest jurisdiction in this Court in that it fails to comply with Rule 8(a)(1) Fed. R. Civ. P.

### Second Defense

The complaint fails to state a cause of action upon which relief can be granted.

### Third Defense

The defendant admits that the female plaintiff was a customer in its store at 1730 Hamlin Street, N.E. on June 11, 1958, when she carelessly caused one of her legs to come in contact with a display stand in the said store. The defendant denies that any negligence or carelessness on its part or on the part of its agents, servants, or employees caused or contributed to the plaintiffs' injuries and damages, if any. The defendant is without knowledge sufficient to form a belief as to the truth of the allegations of the complaint concerning injuries and damages. The defendant denies each and every material allegation of the complaint not herein specifically answered.

### Fourth Defense

The plaintiffs' injuries and damages, if any, were the result of the female plaintiff's sole or contributory negligence.

HOGAN & HARTSON

By: /s/ Frank F. Roberson

By: /s/ Francis L. Casey, Jr.

Attorneys for Defendant
800 Colorado Building
Washington 5, D.C.

[Certificate of Service]

[Filed May 17, 1963]

PRETRIAL PROCEEDINGS

May 17, 1963

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: On June 11, 1958, P was a customer in a store owned and operated by D at 1730 Hamlin St., N.E., Wash., D.C. when her foot came into contact with a display case.

PLAINTIFF CLAIMS that while she was selecting articles from the display case, her right ankle and foot were caused to strike violently up and against an empty, moveable flat-top platform which extended beyond the counter out into the aisle and was approximately 4 to 5 inches above the floor occupying space that was designed for customer use in selecting articles.

She asserts that the platform was placed and maintained at the end of said counter, and that its placement and maintenance constituted negligence, and that D failed to warn her of the presence thereof.

She asserts that her injuries and damages were caused by the aforesaid negligence.

DEFENDANT denies any negligence on its part or that of its agents, servants or employees, and denies that any negligence on its or their parts in any way caused or contributed to P's injuries and damages, if any.

Further, D asserts that, if P sustained any injuries and damages, they were the result of her sole or contributory negligence in failing to look or look effectively so as to see and appreciate her surroundings.

PLAINTIFFS' CLAIMED INJURIES:

Female P: sustained a ruptured or slipped disc in her back, bruised and contused ankle and instep causing damage to a nerve.

P claims PERMANENT damage to her back and ankle.

Male P: seeks to recover for loss of consortium and society of his wife, female P.

SPECIAL DAMAGES:

| | |
|---|---|
| Dr. Harvey H. Ammerman | 500.00 |
| Dr. Henry S. Robinson | 400.00 |
| Dr. John W. Lawlah | 35.00 |
| Dr. Robert E. Lee | 20.00 |
| Dr. James W. Watts | 20.00 |
| Freedman's Hospital | 312.00 |
| Rogers Surgical Appliance | 52.00 |
| R & G Orthopedic Appliance | 45.00 |
| Orthopedic Shoes | 20.00 |
| Medicines from 6/11/58 to 4/1963 | 1,309.80 |

---

NOTE: Although counsel for P claims the foregoing PERMANENT and other injuries, no written medical evidence was presented at pre-trial to sustain these contentions.

---

STIPULATIONS

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before June 7, 1963, a list of the names and addresses of all witnesses known to them, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before June 7, 1963, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for Ps agrees to make the Ps available for the purpose of a physical examination by physicians of D's choice before, but not to interfere with, trial.

Counsel for P agrees to supply counsel for D with a written report from Dr. Harvey Ammerman on or before June 1, 1963.

Counsel for P agrees to furnish to counsel for D a written authorization, which will be supplied by D within 5 days and returned to D on or before June 1, which will enable D to examine and copy records of Freedman's Hospital concerning female P, following which the foregoing records may be admitted in evidence at the trial without formal proof, subject to all legal objections.

Counsel for Ps agree that the male P was able to obtain the medicines listed at $1309.80 hereinabove at a wholesale cost of $785.88, to which amount P agrees he is limited, in this connection.

The following may be admitted in evidence without formal proof, subject to all legal objections: hospital bills if initialled by counsel for both parties; photographs initialled by Examiner.

Counsel for P agrees to answer interrogatories, previously filed, on or before June 1, 1963.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

/s/ J. J. Finn
Pretrial Examiner

TRIAL COUNSEL:

/s/ Richard R. Atkinson, Esq. for P
HOGAN & HARTSON

/s/ James A. Belson
for Jeremiah C. Collins, Esq. for D

## EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
January 23, 1964

The above-entitled matter came on for trial before THE HONORABLE CHARLES F. McLAUGHLIN, District Judge, and a jury, commencing at 11:05 o'clock A.M.

* * * * *

## PROCEEDINGS OF JANUARY 23, 27, 1964

2

MAGGIE LEE BUGGS

one of the plaintiffs herein, was called as a witness by counsel for plaintiffs, and after having been first duly sworn by The Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ATKINSON:

Q. Will you give your full name, please, Mrs. Buggs? A. Maggie Lee Buggs.

Q. Where do you live, Mrs. Buggs? A. 4103 Eighteenth Place, Northeast, Washington, D. C.

* * * * *

3

Q. Calling your attention to June 11, 1958, did anything occur to you on that day? A. Yes.

Q. Where was it? A. The Safeway Store on Hamlin and Eighteenth Street.

* * * * *

6

A. * * * I struck my instep and ankle and fell over on it, and the person that was replenishing the shelves heard the commotion. So he came to me and helped me up off the platform.

* * * * *

11

A. He asked me if he could help me.

* * * * *

A. I said, "Yes, you can. I fell over a platform at the end of the shelf – at the end of one of the shelves." So he came with me.

Q. What did you then do? A. I showed him my knee, which was cut, just slightly cut; a little blood. And the person that was replenishing the shelves was there also, so I asked him –

Q. By "him" who do you refer to? A. The manager.

* * * * *

13 Q. Now, Mrs. Buggs, did there come a time that you consulted a doctor with respect to your foot injuries which occurred on the 11th, that you testified to? A. Yes.

14 Q. Give me the name of that doctor. A. Dr. Henry Robinson.

* * * * *

16 Q. Did there come a time after the course of treatment that the doctor discharged you as improved? A. Yes.

Q. Approximately when was that? A. I don't remember. I don't remember the exact time.

Q. About how long from the time your leg was first injured or your ankle was first injured? A. Oh, six or seven weeks.

17 Q. And now did there come a time in September that something happened to the foot? A. Yes.

Q. What happened to it? A. I – the foot turned – I mean, the foot was weak.

Q. You said it was weak? A. And I could walk across the floor and all of a sudden it would turn.

Q. By turning – A. Twist.

* * * * *

Q. Now, did there come a time that you improved again?

* * * * *

18 Q. Now, did there come a time in February of 1959 that something happened to the same foot? A. Yes.

Q. What was that? A. The same thing happened. I twisted my foot.

* * * * *

23 Q. * * * Was there ever any time from June 11 to the present time that you were without some effects of that leg, that ankle injury? A. No, there has not been.

Q. What has been the nature of the constance – would you say whether it was pain, discomfort or weakness? A. Weakness plus discomfort at times, and numbness of one half of the foot.

Q. During what period of time from that time to the present time have you suffered pain from this thing? A. I didn't understand.

Q. I say during what period of time, could you say, from certain dates to certain dates, approximately, that you were having these pains and so forth from the injury? A. No, I can't.

Q. Did you understand my question? A. I am afraid I don't.

Q. When was the last time you had any pain in your back? A. Oh, I have that constantly. Weakness in the back. Not pain all the time but discomfort.

Q. Is it your testimony you have occasional pain? A. Yes.

* * * * *

27 Q. Do you have any injuries now; anything wrong with you as of now? What is your condition? A. The numbness of part of the right foot.

28 Q. How does that numbness affect you? A. It feels like it is asleep all the time and many times I think I have my foot all the way down on something and I don't.

Q. Does anything occur because of that? A. Sometimes I fall. I make a mis-step and fall.

Q. Now, at the present time over what area is that numbness, as far as you know? A. The numbness started in the big toe right after the cast was removed; just a slight numbness in the big toe.

Q. Did it remain slight? A. Yes.

Q. How long did it continue slight? A. Until – I think it was the disc trouble.

Q. After the disc trouble what happened? A. It started feeling more –

Q. Will you tell over what area you have the numbness now?

A. Let's see. From about – you mean of the entire – all of the toes.

Q. Your entire body I am referring to. A. Oh, about three weeks after the accident.

* * * * *

29 Q. My question is: What percentage of your entire body is affected by that numbness? A. From the hip down.

Q. By "from the hip down" do you mean from the hip down to the toes? A. Yes.

Q. Is it one toe or more than one toe? A. Yes.

Q. All of them? A. Yes.

Q. By numbness you mean you have no feeling there? A. Partially.

* * * * *

31 Q. Since 1960, and since the operation, the disc operation, have you had any falls? A. Let's see. In July –

Q. First, the year. What year? A. July of 1961.

Q. What happened? A. I was walking across the living room floor and my foot just turned.

32 Q. Which foot? A. Right foot. Like you twist your ankle. It just went down and I just sat on the floor.

Q. Did your foot fall asleep at that time? A. Oh, yes.

Q. Go ahead and tell us what further happened. A. In March of 1962, practically the same thing occurred.

Q. When your foot gave way on these occasions did you fall to the floor or anything of that sort? A. Only at first – no, those two times I didn't fall. I just sat down on the floor. In February of 1963, I was coming down the stairs and I thought I had my right foot on a step and I did not and I lost my balance and I fell three flights of steps on to the living room floor.

Q. Did you injure yourself at that time? A. No.

Q. Did you have any further falls since? A. September of 1963.

Q. And will you tell us what happened then? A. I was in the back yard and I started down the cement steps that lead to the basement and

the same right foot was on the landing. I thought I had it all the way on the landing and I did not and I lost my balance and fell backwards eight steps.

Q. Did the foot fall asleep on that occasion? A. Yes.

33 Q. To what extent did you injure yourself? A. I was hospitalized four days. I had a slight concussion.

* * * * *

37 CROSS EXAMINATION

BY MR. CONNOLLY:

* * * * *

79 Q. Did Dr. Robinson discharge you on July 16? A. Temporarily.

Q. Did he say temporarily or did he say you needn't come back, you are all better? A. He said I was improved.

Q. And he said he didn't want to see you any more, didn't he? I mean, he didn't say, "I am going to discharge you temporarily", did he? A. No, he said, "you are improved so I will discharge you."

Q. He said, "I will discharge you." He did not qualify it as you did a few moments ago by saying he discharged you temporarily, did he? A. Not temporarily. "I discharge you."

Q. You did not see Dr. Robinson during August, did you? A. I don't recall.

Q. You know you didn't. A. Pardon?

Q. You did not see Dr. Robinson again until you had another accident, did you? A. When I twisted my foot again.

Q. You say you twisted your foot again? A. I meant twisted my foot. I am sorry, sir.

80 Q. Because you did not twist your foot in the Safeway Store. Have we established that? A. I am sorry. Yes.

Q. So there came a time you did twist your foot. A. Yes.

Q. Where did you do that? A. In the house.

Q. Did you strike it on some object of furniture? A. No, I did not.

Q. When did you do this? A. September of 1958.

Q. The first part of September, wasn't it? A. I don't remember the exact date.

Q. And you went to Dr. Robinson following that? A. Yes.

* * * * *

Q. You had a swollen ankle at this time and received six treatments? A. I don't recall how many, sir.

81 Q. There was no longer any pain or swelling and he discharged you? A. I had pain and swelling.

Q. When he discharged you? A. Yes, but it was improved.

Q. He discharged you on the same terms he discharged you in July, did he not? A. After any number of treatments.

Q. Six I suggest. A. I don't recall the number.

Q. No cast that time. A. No, sir.

Q. Nothing applied to your leg that you wore out of his office. A. This bandage I had on before.

Q. The elastic bandage? A. It wasn't elastic. It was similar to gauze but it isn't gauze. It was stretchable material.

* * * * *

82 Washington, D. C.
January 27, 1964

* * * * *

83 CROSS EXAMINATION (Resumed)

BY MR. CONNOLLY:

Q. Mrs. Buggs, to orient you, myself and everyone else here, you will recall when we terminated last Thursday I was asking you about the second fall you had in your home in September, 1958.

I understood you to say that you had turned your ankle in your home and you had fallen on that occasion and that prompted you to go back to the doctor.

* * * * *

MR. ATKINSON: I object to the form of the question. It implies she said something she did not testify to. There was no testimony she twisted her foot. She said her ankle gave way.

* * * * *

85 BY MR. CONNOLLY:

Q. Mrs. Buggs, I am going to ask the reporter to read to you a portion of your testimony which he took down here last Thursday.

He is going to read it to you and when he is finished let him go back to his place and I want you to tell the ladies and gentlemen of the jury whether that testimony is true or not.

86 (Thereupon, the reporter read from his notes as follows:

BY MR. CONNOLLY:

"Question. You did not see Dr. Robinson again until you had another accident, did you?

"Answer. When I twisted my foot again.

"Question. You say you twisted your foot again?

"Answer. I meant twisted my foot. I am sorry, sir.

"Question. Because you did not twist your foot in the Safeway Store. Have we established that?

"Answer. I am sorry. Yes." (See page 80)

BY MR. CONNOLLY:

Q. Is that testimony true or not true? A. I don't remember having said that, sir. I remember having said that my foot gave way twice. I fell four times. Twice my foot gave way and I went down to the floor. Four times I fell when my foot gave way.

Q. Mrs. Buggs, what I want you to answer is this: Is that testimony which the reporter just read to you true or not true? You can say yes, no, or I don't remember. A. It is not true.

87 Q. You say this morning that your foot gave way? A. Twice.

Q. We are talking about September 1958. A. September of 1958, my foot gave way.

Q. Now, how did your foot give way? A. I was walking across the floor and all of a sudden it just went down. It does that right now.

Q. What went down? A. I could be walking across the floor like this and it gives way and I will sit right down on the floor and it did that twice. And four times –

Q. Hold on. We are talking about September 1958. A. September 1958.

Q. You mean you were walking across the floor and your right foot – you just couldn't bear weight on your right foot and you collapsed? Is that right? A. Well, sometimes it just –

Q. * * * Just confine it to September 1958. Is that what happened on that occasion? A. Yes, sir.

Q. You put weight on your right foot and your right foot would not sustain your weight and you fell on the floor? A. I did not fall. I just sat down on the floor.

88 Q. So you did not twist your ankle on this occasion? A. I did not, no, sir.

* * * * *

94 Q. In any of these accidents you had, did you hit the big toe?

A. No, I did not.

MR. CONNOLLY: May I have the hospital records?

(Mr. Atkinson handed the hospital records to Mr. Connolly.)

BY MR. CONNOLLY:

Q. You were in Freedmen's Hospital in September '63, weren't you? A. Yes.

Q. That is when you fell down some steps. A. Yes.

Q. And you were taken there unconscious? A. No, I wasn't unconscious.

95 Q. Never lost consciousness. A. No.

Q. But you were taken there on this frame your lawyer talked about the other day. A. The ambulance.

Q. When you arrived at the hospital they took a story from you. They asked you what happened and asked you about your past history.

A. Not immediately.

Q. When you were there for awhile they did. A. Yes.

Q. Did you tell the doctor that took this first history last September in Freedmen's Hospital that you had had an incident five years ago

in which you struck the instep of your right foot against the point of a platform in a local store; that you sustained a severe bruise, necessitating a cast being placed upon the foot and leg; several months later the patient hit the toe of her right foot against a chair causing her to fall backward into another chair? A. That is not correct.

Q. You did not tell the doctors that took you into Freedmen's Hospital that just last September? A. I did not.

Q. That you struck your big toe against a chair? A. I did not fall, sir.

96 Q. I am not as concerned with whether you fell. I want to know whether you told the admitting doctor at Freedmen's Hospital last September that several months after your Safeway incident, that you had struck the toe of your right foot against a chair? A. I did not say that, sir.

Q. You deny saying that. A. I deny saying that, sir.

Q. Did you do that? A. I did not, sir.

Q. In September of 1960, you were a patient in Freedmen's Hospital when Dr. Harvey Ammerman operated on your back; isn't that correct? A. Yes.

Q. When you went into the hospital on that occasion they also took a history from you, did they not? A. Yes, they did.

Q. Did you not tell the doctors at Freedmen's at that time as follows: "One and a half years ago patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disc slipped out of place." A. I did not say that, sir.

Q. You did not say that. So you deny telling the admitting physician at Freedmen's Hospital on either occasion that you struck your toe. A. I

97 don't remember having said that.

Q. You deny that ever happened. A. I deny that ever happened.

* * * * *

Q. Now, in February, 1959, you had an accident at home at which time you called Dr. Robert Lee; is that correct? A. Yes, I did.

Q. He came to your house. A. Yes.

Q. At that time didn't you tell Dr. Lee that you had hit your foot against the leg of a chair? A. I don't remember having said that.

* * * * *

Q. Did you tell Dr. Lee that you struck your foot against the leg of a chair? A. I don't remember having said that, sir.

Q. Did that happen? A. No, it did not, sir.

98 Q. Would you deny having told Dr. Lee that? A. I would, sir.

Q. Now, September, 1958, you now say this morning that your right foot gave way and you went to Dr. Robinson; and that foot did not give way, did it, because of any numbness in your big toe? A. No. Because the foot was weak and it was still swollen, because of the soreness, and the pain I had been having in it and was still having in it.

* * * * *

99 Q. When you had this fall or when you had this incident in your home in September 1958, when your foot gave way, had the swelling come up at that time? A. It was still swollen; just a little; not like it was.

Q. Did it hurt you to walk on your ankle at that time? A. It did, sir.

Q. Were you using any assistance in walking? By that I mean a cane or crutches? A. Crutches.

Q. You were using crutches in September 1958? A. At times.

Q. The pain was so severe and you were so unable to walk on your right foot in September of 1958 that at times you had to use crutches?

100 A. I am sorry, sir. I had a little stick like, that I used. That was in 1958. But I did use crutches.

Q. When did you use crutches? A. After Dr. Robinson put the cast on.

Q. No. The cast, we established last Thursday, came off in July. A. But I did use them after –

Q. How long after? A. I don't recall, sir.

Q. Were you still using them when Dr. Robinson discharged you as improved? A. Yes.

Q. Still using them. Still unable to get about without using crutches, and he discharged you? A. I could get about but I could not put all my weight on my foot.

Q. That being so he nevertheless still discharged you; is that correct? A. Pardon?

Q. He still discharged you even though you could not put all your weight on your right lower extremity? A. Yes.

101 Q. You used these crutches after being discharged in July, 1958, for how long? A. I don't recall, sir.

Q. A week, two weeks? A. I don't recall, sir.

Q. Now, in September you had this fall at home; the incident when your foot gave way at home.

Now, were you still using crutches at that time? A. What is that? '59?

Q. No, ma'am. '58. A. Oh, '58.

Q. We are still talking about the second incident. A. No, I was not using the crutches. I said I was using a little stick like, at times.

* * * * *

109 Q. Miss Henrie Stewart was present in the house when this incident in February of 1959 took place. A. Yes.

Q. Did she see it take place? A. She did not see it. * * *

* * * * *

Q. What happened? A. I came out of the kitchen into the dining room to get something out of the credenza. My foot gave way by the chair that was at the table, and I did not fall, sir. When it gave way I turned around and sat down in the chair. My foot did not hit the chair. The chair was near the credenza and as I walked across from the kitchen to the dining room the chair was at the table and it was not up against the table – not under the table. It was pulled out.

* * * * *

110 Q. Your foot gave way. A. Yes.

Q. Was it in pain at this time? A. Not severe pain.

Q. It was in pain. A. At times.

Q. Was it at the time it gave way? A. I don't recall if it was or not, sir.

Q. Was it swollen at the time it gave way? A. Slightly, sir.

111 Q. You came out of the kitchen and you say your foot gave way, and by that I take it you mean it would not support your body weight; is that correct? A. Correct, sir.

Q. You did not fall, but you fell into a chair. A. I did not fall into the chair. I turned around and sat into the chair and my body was twisted.

* * * * *

138 Q. Did your pain suddenly get more severe? Did you get more disabled? A. At times.

139 Q. In the summer of 1960. A. Not more severe but I suffered pain.

Q. How about the numbness? A. And numbness.

Q. Was this spreading at all? A. The numbness?

Q. Yes. A. Yes, it was.

Q. It had gotten in the big toe and gotten in the other toes and a little bit back from the other toes.

Now, describe where it had gone to by the summer of 1960.

A. All of the toes were affected.

Q. I thought that had had happened early in 1960 or late 1959.

A. It had – all of my toes were numb. Not completely, but numb.

Q. Had the numbness extended to other areas of the foot and leg by the summer of 1960? A. I don't recall, sir.

Q. Did something happen to you that was traumatic or had something slowly happened to you that made Dr. Ammerman want to put you in the hospital and operate on you? A. Because of the numbness in the toes.

Q. Did you have a foot drop? A. Yes, I did.

140 Q. When did you first have the foot drop? A. I don't recall, sir.

Q. What do you mean by foot drop? A. What do I – sort of a flap like. My foot would flap when I would walk. The toes would sort of flap.

Q. You couldn't raise your foot. Is that right? A. I couldn't raise it altogether.

Q. I wanted the jury to see what I was doing.

Your foot would hang down? A. No, it would not.

* * * * *

141 Q. Mrs. Buggs, when did you first notice the condition you were unable to raise your right foot and that it flapped when you walked? A. I don't recall, sir, the exact date.

142 Q. Was it before or after your operation? A. I don't recall.

* * * * *

152 Q. Before your operation in September of 1960, did you or did you not have numbness in your foot and leg other than in your toes and great toe? A. I had numbness in my toes, slight numbness on the outer side of my ankle, up on the outside of my leg; very slightly on the leg.

* * * * *

153 Q. Mrs. Buggs, did you have any accidents after your hospitalization in September 1960?

* * * * *

THE WITNESS: 1961 – July of 1961, March of 1962, February of 1963, and September of 1963.

BY MR. CONNOLLY:

Q. Four? A. Four.

Q. And the two incidents before the operation. Is that right? A. I did not fall then, sir.

Q. Your foot gave way. A. Yes, sir.

Q. Both times you required medical treatment, didn't you? A. Yes, sir.

Q. What happened in July 1961? A. I was coming out of the kitchen into the dining room into the living room, and my foot gave way and I sat right down on the floor. That was in July 1961.

154 Q. Was it in the same part of the dining room you were in when the thing happened earlier? A. No, I have to come out of the kitchen, through the dining room into the living room.

Q. This happened in the dining room? A. This happened in the living room.

Q. I thought you said this happened in the dining room. A. I came through the dining room into the living room; as I was coming into the living room.

Q. And your right foot just gave way? A. Just gave way.

Q. Did it give way in July of 1961? A. Yes.

Q. You did not turn it? A. I did not turn it. It just gave way and I sat right down on the floor.

Q. You did not stumble or trip over a rug or piece of furniture? A. I did not. It just gave way, and I sat right down on the floor.

Q. Did you injure your back, your ankle, or any other part of your anatomy? A. Not that I know of.

155 Q. Did you have medical treatment? A. I did not, sir.

Q. You never told any doctor about it. You never told any doctor about this incident. A. No, I did not.

Q. The next was in March of 1962. A. Yes.

Q. What happened in March of 1962? A. The same thing. The only thing, I was upstairs then.

Q. You did not twist your foot? A. I did not twist it.

Q. Or ankle. A. I did not.

Q. You did not stumble. A. I did not, sir.

Q. Your foot gave way. A. Yes.

Q. When you put your weight on it it just gave way. A. Yes.

Q. The next was in February of 1963. A. Yes.

Q. What happened then? A. I was coming down the stairs from upstairs, down into the living room, and I thought I had my foot all the

156 way down on one step and I did not. I lost my balance and I just slid down two or three steps into the living room.

Q. Your foot didn't give way then. A. I thought I had it all the way down, because at times I don't know whether it is all the way down or not.

Q. Your foot did not give way? A. I guess it didn't. I just thought I had it all the way down on the step and I made a misstep and just –

Q. Now, how about September 1963? A. September 1963 I was standing on the top of the cement steps that lead to the basement and I thought I had the foot all the way down on the top part of the step, and instead half of it was on the top part and half was on the outer part as you would come down the steps. I lost my balance and I fell backwards eight steps and my head hit on the bottom of the landing as you go into the basement.

Q. The foot didn't give way that time. A. I thought the foot was all the way down. It feels very heavy. I don't know when I have it all the way down on something and I don't.

* * * * *

158 Q. Now, neither in 1963 – in neither event in 1963 did the foot give way? A. Pardon?

Q. Both in February and September 1963, you would not describe those accidents as situations where your foot gave way, would you?

A. It is from the numbness of the foot.

Q. How do you know it is from the numbness of the foot? A. Because I don't have the full use of my foot.

Q. And that is what you say happened on those occasions? A. I thought I had it all the way down, because half of the foot is numb.

* * * * *

[Previous trial ended in a mistrial.]

PROCEEDINGS OF MARCH 10-13, 1964

172 MAGGIE L. BUGGS

the plaintiff, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAWSON:

Q. * * * Would you state your full name and address, please?

A. Maggie L. Buggs, 4103 18th Place, Northeast.

* * * * *

Q. And did you have occasion to go into a Safeway Store at 18th and Hamlin Streets, Northeast, on June 11? A. Yes, I did.

Q. Will you tell the Court and the ladies and gentlemen of the jury in your own way exactly what happened? A. I went to the Safeway Store at 18th and Hamlin Streets, Northeast, to make a few purchases. I entered the store and got a cart, came down the aisle in front of the

173 cashier, that aisle, that cross aisle, went over to the aisle next to the wall where the bread and the frozen goods were. I made some purchases there. I remembered that I had forgotten black pepper. I left my cart near the frozen goods. I came around into the back cross aisle to come down the other aisle where the shelves were. Sitting there was a person replenishing the shelves. I asked him where the black pepper was. He pointed down the aisle and said, "Down there." I walked normally down the aisle looking for this item on the shelves, which I did not see at the end of the shelves. I did not see it. I turned into the cross aisle. As I turned into the cross aisle, there was a low platform about instep height. My foot hit under this platform hurting – and I fell over on it. I had a cut on my knee and a cut on the instep. * * * I left and went to the cashier

174 and checked out; came out of the store thinking that I might be able to get a cab. Not seeing one, I saw the bus coming. I got on the bus and rode to 18th and South Dakota, which is just a block from my home.

When I got home my foot was in pain. The swelling had started in my ankle. I soaked it in lukewarm water and Epsom Salts for about fifteen or twenty minutes. I stretched out on the sofa in the living room. I was in so much pain I called my husband. Then I stretched out, continued to stretch out on the sofa. I finally hobbled up stairs and got into bed. When my husband came we soaked it again, and there I remained until the next morning. The next morning I could not put my foot on the floor. It was swollen and very painful. I stayed in bed all day.

About 7:00 or 8:00 o'clock that Thursday night I called our family physician, who is Dr. Spellman. He advised me to see an orthopedic surgeon if I continued to have trouble. At that time Dr. Robinson's office was closed. I guess it was closed, but anyway I didn't call him until the next morning, which was a Friday, a Friday, not the morning, but during the day, Friday, I called him, and made an appointment. He could not see me until the 16th, but he advised me what to do. That was Monday, the 16th. I went to his office. He examined my foot, made an X-ray and gave me treatments, ultrasonic treatment, hydrotherapy and ultrasonic treatment, after which he taped my ankle and told me to get some crutches, which I did.

For about a month or better I went regularly for treatments, ultrasonic and hydrotherapy treatments. During the period of the month he put a cast on my foot up to my knee, which I wore for about two weeks. Then I was discharged as improved, but still had the pain. Whenever I would try to place my foot or walk on it, I would get pain in it, and the swelling was still but not as severe in my foot.

Over the period of the month I suffered greatly, and after about seven weeks seeing him at intervals I twisted my ankle. My foot gave way, which was very weak, and I twisted my ankle. I had to go back for more treatments. Over a period of about three and a half months I received treatments at intervals.

In February of '59, February 2d of '59, I had an appointment for a treatment for my foot. February 1st of '59 I was walking across the floor. My foot gave way, and I twisted my ankle. Again trying to keep

from falling to the floor, I twisted my back. I sat down in the chair, and
176 after I got my composure I called a neighbor, a Dr. Lee, Robert E. Lee, a physician. He came to my rescue and prescribed – he examined me and prescribed some medicine for me. I had a sofa bed in my living room, a sofa that could be made into a bed. I couldn't walk. He placed me on the bed, or in this bed. The next morning, which was a Monday morning, I called Dr. Robinson, who was still treating me for my ankle. He came by the house and he examined me. He told me to put a board under the mattress, and when I felt better or could walk a little better, or could walk a little, to come to the office for a thorough examination.

I remained in the living room for over two weeks, using a bed pan. I could not move. When I was able to go to Dr. Robinson's Clinic for the treatment, he started – he examined me and he started ultrasonic treatments for my back, and I was still getting therapy and ultrasonic treatments for my foot. I went to him over a period of several months. He prescribed a brace for my back, which I wore constantly. I couldn't walk very well without the brace. I was using the brace and the crutch in order to place my foot down, which I couldn't very well, on the floor without discomfort.

In September – before the disc dislocation, several weeks after the treatments for my – after I was discharged, after the cast was removed,
177 I felt a numbness in my big toe, and it grew worse. That was before my ankle turned again, and I injured my back. After several treatments – after any number of treatments at irregular intervals, and my toes began to feel numb, some other toes started feeling numb, he recommended me to Dr. Harvey Ammerman, who is a Neurosurgeon. I went to him for at least five months for examinations. I didn't go immediately when Dr. Robinson told me to go. I waited for at least five or six months hoping that I would improve, but I grew worse, so I had to go. Then I went to him for at least five months for examinations. I grew worse. So he said that I would have to be placed – I would have to go to the hospital.

In September of 1960 I entered Freedmen's Hospital. After a myelogram was made, he said that I would have to have this operation. I

remained in the hospital for at least fifteen or sixteen days. When I came home I couldn't walk. I remained in bed upstairs for six weeks unable to do anything, with severe pain.

In November of 1960 was my first visit back to Dr. Ammerman's office for a check-up. I was put in a wheel chair. When I got to the office I couldn't walk very well, so I was placed into a wheel chair and pushed up to his office, on the elevator up to his office, and he examined me. I went to him at intervals over a period of many months. During that period, he and Dr. Robinson prescribed a foot brace because I had a limp.

178 The rest of my toes, which had started before the operation, became numb. They are still numb. I purchased this foot brace from R & G Orthopedic Appliances, which I wore for over nine months. In September – during that period I had at least three or four other ankle twists, foot twists. September of 1963, before September of 1963, in July of 1963, I went to Dr. Robinson because I was still having trouble with my back and foot. He prescribed a different brace for my back. In September of 1963 my foot twisted, turned. I lost my balance, fell backwards down seven flights of cement steps. I was placed into – the ambulance took me to Freedmen's Hospital for observation. When I arrived they made an examination. They made X-rays. I had no fractures, no lacerations, but I was there for five days for observation.

* * * * *

179 Q. Now, you testified that on several occasions you twisted your ankle.

Why did you twist your ankle, if you know? A. Pardon me?

Q. Why did you twist your ankle, if you know? A. Because my foot is very weak.

Q. As a result of what? A. As a result of the accident I had in 1958.

MR. CONNOLLY: Your Honor, I move that be stricken. I think that calls for a medical opinion.

[THE COURT:] I think that is a question of fact for the jury, andjust

the bringing out of the facts is what we call for from the witness, please.

* * * * *

186 BY MR. LAWSON:

Q. Were there any commodities or anything on the platform?

A. Not anything.

* * * * *

187 Q. Now, as a result of this accident did you have to spend certain months at the hospital and doctors' bills? Did it cost you anything?

A. Oh, yes, around two thousand dollars for medicine, hospital bill, doctors' bills.

Q. Do you recall how much you paid Freedmen's Hospital?

MR. CONNOLLY: Your Honor, I assume some place during the course of the case the actual bills will be produced and put in, won't they? Then we won't have to guess about these things.

* * * * *

194 MR. CONNOLLY: * * * I have no quarrel about the amounts of them, but I do quarrel whether these expenditures are related to this incident in the Safeway Store, and I submit that requires medical testimony to establish that, and that foundation hasn't been established as to that.

* * * * *

THE COURT: Very well, I think it might be well to avoid any conflict about it.

MR. LAWSON: All right, that is all. Proceed. That is all I have.

* * * * *

CROSS EXAMINATION

BY MR. CONNOLLY:

* * * * *

239 Q. Now, did the blow which your right instep received, was it of sufficient force as to even break your stocking? A. Yes.

Q. "Question: Did this blow you had to your right instep break your stocking?

"Answer: No, it did not." – page 65.

Now, what is the fact, Mrs. Buggs? A. I don't understand what you mean.

Q. I just asked you the question, whether the blow that you received to your right instep was sufficient to cause a break in your hose or your stocking, is the word I used. A. I said yes.

Q. And I ask you now if at page 65 when the same question was asked of you – "Question: Did this blow you had to your right instep break your stocking?" – if you didn't say, "No, it did not." A. What is that, in the deposition, Mr. Connolly?

240 Q. No, ma'am. It is the testimony you gave under oath in this very courtroom last January 23d, January 23d, 1964. A. I still say that the questions, a lot of the questions that you asked me got me so confused. If I made that statement, I most certainly didn't intend to, because my stocking was torn.

Q. Well, let's see how confused you were. Here is the question: "Did this blow you had to your right instep break your stocking?" "Answer: No, it did not."

"Question: I assume you were wearing silk hose or nylon hose the ladies wear these days. Your hose were not torn?

"Answer: The knee.

"Question: Where you struck wasn't torn?

"Answer: No.

"Question: And you did not develop a run from that place?

"Answer: I don't recall.

"Question: You said your knee was cut?

"Answer: Just slightly. Just a scrape.

"Question: And there was a hole in your hose at the knee?

"Answer: Just a small hole."

A. Yes.

241 Q. (Reading) "Show us what you mean by small hole." "Just a very small hole." "Are you saying as large as the tip of your finger or large as the point of your nail on the middle finger, or an inch?" "About

the size of an eraser, I imagine, in a pencil." "The top of an eraser?" "Yes." "This size? (Showing pencil with eraser.)" "Yes, just about."

Now, do you remember giving that testimony? A. Yes, I do.

* * * * *

242 Q. Isn't that what took place? A. Yes.

Q. Now, Mrs. Buggs, you testified this morning that you had this fall in the Safeway in June, that in September you twisted your ankle, and again had to go under the care of Dr. Robinson. Then you testified that in February '59 you twisted your ankle and you wrenched your back, and you had to go lie in a sofa-bed in your living room for a couple of weeks, and you were under the care of Dr. Robinson. Then you testified that your ankle gave away a couple of more times, and you said that in September of 1960 you went into the hospital and you had a myelogram and then an operation to your back, and when you came home you couldn't walk and had to stay upstairs for six weeks.

Do you remember giving that testimony? A. Yes.

Q. Now, your deposition was taken in June 1961, over two and half years ago, and a lot closer to the events than now. On page 48 Mr. Casey said: "Now, have you had any accidents since June 11, 1958?" And you said, again under oath, "No, I have not, other than the ankle is weak and

243 on the spur of the moment, still, I wear low-heel shoes all the time, and it just goes right down." "Well, have you had any falls since June 11, 1958?" "Answer: No, I have not." "Question: Have you been in any other accidents that you can think of since that time? Whether it was a fall or an automobile or anything?" "No, I have not." "Question: Have you had any injury to your back or legs since June 1958?" "Answer: No, I have not."

Is that testimony true, Mrs. Buggs? A. The fall in February of 1959 is not in the deposition, Mr. Connolly?

Q. Not a word. A. The operation was in 1960.

Q. Not a word about the operation. A. The operation was in 1960.

Q. Right. This deposition was taken in June 1961, the following year. A. I had six falls altogether from '58 through '63.

Q. Mrs. Buggs, if you did and you were under oath in June of 1961 and the question was put to you, why didn't you tell the examiner? A. It was stated, Mr. Connolly, that I had a fall of February 1st, 1959.

Q. States where and to whom? A. In my deposition.

244 Q. Look, you were asked at pages 48 and 49: "Have you had any falls since June 11, 1948?" "No, I have not." "Have you been in any other accidents that you can think of since that time? Whether it was a fall or an automobile or anything?" "No, I have not." "Have you had any injury to your back or legs since June 1958?" "Answer: No, I have not." A. Mr. Connolly, further in the deposition something comes in about the disc. I don't know what page it is on, but it was stated.

Q. Oh, yes, you mentioned a disc. You mentioned a disc. A. It was stated that I had a fall. I didn't fall; I twisted my ankle, and to keep from falling, I twisted my back.

Q. Now, let's refresh your recollection. A. In 1959, February 1st –

Q. Let's refresh your recollection as to what you did say about the disc. Now, bear in mind this is 1961 that you are testifying in as I'm reading to you now – A. Yes.

Q. (Continuing) – and presumably your memory should have been a lot fresher. "Now, when did you first learn that you had a slipped disc, as you call it?" This is page 44. "Answer: I think that is the term that I should use, the slipped disc." "Question: When did you first learn of

245 that?" "Answer: It was – I don't have my dates right. It was after the accident, after the – it was in 1959. The latter part of 1958 or the earlier part of 1959. I don't know the exact time." "What complaints did you have that resulted in that diagnosis?" "I could not walk. I was in bed for five or six weeks." "Question: When did you first have that trouble, that you could not walk?" "Right after it happened." "Right after the accident happened?" "Right after the slipped disc came up, after the disc came out of place." "Question: But, you don't know when that was?" "It was the latter part of 1958 or the earlier part of 1959." * * *

246 "When was the operation performed?" "September." "Of what year?" "Of this year." "1960?" "1961." The examiner said, "We have not come to September of 1961 yet." "Answer: Oh, the operation?" "Question: September 1960?" "Answer: 1960, what am I thinking of. I am sorry. I am confused." "Question: Did Doctor Ammerman tell you that he thought he knew what caused that disc condition?" "Answer: No, he did not." "Did Doctor Robinson tell you what he thought caused that disc condition?" "No, he did not." "And you had that back pain from late 1958?" "No, – oh, yes. I am sorry." "Or early 1959, and you were operated on in September of 1960, is that right?" "Answer: Yes, September 1960."

Now, that's your testimony about the disc. And when the question is specifically asked you whether you had any falls you say no. A. Mr. Connolly, I'm sorry, I definitely mentioned the fall in February of 1959.

Q. I am sorry to take the jury's time, but since you want to make an issue of it, you find it. A. I am not making an issue of it, Mr. Con-

247 nolly. I couldn't help but make the statement.

* * * * *

253 Q. Now, quite apart from whether any corrections were made or not, in either the Court's copy of the deposition or your own copy of the deposition, you have challenged me and said that you clearly stated in your deposition that you made reference to a fall of February 1959. I ask you either to agree with me that there is no mention of it in there or else find it. A. I'll find it.

254 Q. All right, do so. A. If it's in here, I will try; I will attempt to find it.

(The witness looked through the deposition.)

I don't seem to be able to find it in here, Mr. Connolly.

Q. Persist, Mrs. Buggs, either that or agree that it is not there.

(Witness continued to look through deposition.)

A. I do not see it in here, Mr. Connolly.

* * * * *

255 Q. Have you made a complete examination? A. I have not. I have glanced at several pages.

Q. Then please take the time to make a complete examination.

* * * * *

259 (Short recess).

* * * * *

Q. Now, Mrs. Buggs, have you had sufficient time to examine thoroughly the transcript – Mrs. Buggs? A. Yes.

* * * * *

260 Q. Now what page do you have reference to? A. I have page 44 and page 48.

* * * * *

264 Q. Are you ready, Mrs. Buggs? A. Yes.

Q. Go ahead. Where are you now? A. Page 44.

Q. All right. A. (Reading:) "Question: Now, when did you first learn that you had a slipped disc, as you call it?" "I think that is the term that I should use, the slipped disc." "When did you first learn of that?" "It was – I don't have my dates right. It was after the accident . . ." – and right there –

265 MR. CONNOLLY: Wait a minute.

MR. LAWSON: Read it.

MR. CONNOLLY: Read it.

THE WITNESS: Oh, I'm sorry.

MR. CONNOLLY: "It was after the accident," comma.

THE WITNESS: "It was after the accident, after – it was in 1959. The latter part of 1958 or the earlier part of 1959. I don't know the exact time." "What complaints did you have that resulted in that diagnosis? "I could not walk. I was in bed for five or six weeks." "When did you first have that trouble, that you could not walk?" "Right after it happened." "Right after the accident happened?" "Right after the slipped disc came up. After the disc came out of place." "But, you don't know when that was," and so forth.

MR. LAWSON: No, read it. You can't say, "and so forth."

THE WITNESS: Oh, I'm sorry. "But, you don't know when that was?" "It was the latter part of 1958 or the earlier part of 1959." "Did you have any pain at that time?" "Oh, yes." "What was the pain?" "Right here in the back."

* * * * *

266 BY MR. CONNOLLY:

Q. All right, go ahead. Now, what do you want to say on page 48? A. (Reading:) "Now, have you had any accidents since June 11, 1958?" "No, I have not, other than the ankle is weak and on the spur of the moment, still" – I don't understand it – "I wear low-heel shoes all the time, and it just goes right down." "Well, have you had falls since June 11, 1958." It says, "No," but I made a correction and put, "Yes."

Q. What do you mean you made a correction? A. After I read the deposition over the first time and I called my lawyer's attention to it.

* * * * *

269 Q. Now, I want to come to these other instances. There came a time when you had to use crutches, is that not so, Mrs. Buggs? A. Yes.

270 Q. When? A. Right after the accident, after the first treatment, first treatment after the accident.

Q. Now, let's get that absolutely accurate. You went to see Dr. Robinson on the 16th of June 1958, right? A. Yes.

Q. And when you came out of his office you had a crutch? A. No, I did not.

Q. Where did you get your crutch? A. He examined me, made an X-ray on June 16, 1958. I had treatment. He said, "Since you cannot put that pressure on – put the pressure on your foot," to get crutches. I went directly to Professional Drug Store and got the crutches.

Q. All right, then, on June 16th, 1958, you left Dr. Robinson's office and you went right away, and you got – now, did you get one crutch or two? A. I got one crutch.

Q. And that's the one crutch that you used; is that correct? A. Yes.

Q. And you testified this morning that you used that for several months, correct? A. Yes, it could have been more than one month. It could have been two or three months.

271 Q. You testified this morning that you used it for several months? A. That could have been more than two months, one month.

Q. Well, we are not interested in what it could have been.

What was it? A. Several months could have been two months, Mr. Connolly.

Q. You testified several months this morning, didn't you? A. Yes, I did.

Q. All right. Now, we will all agree that "several" is an indefinite term? A. Yes.

Q. All right, so I want you to be a little more specific.

How long did you use the crutch? A. I don't remember exactly how long I used the crutch. I know I used it.

Q. You can't make it any more specific than several; is that right? A. Yes.

Q. Now, there came a time when Dr. Robinson put a cast on your leg, did he not? A. Yes.

272 Q. And that cast was not a hard plaster of Paris cast that we might readily think about, but it was a soft case; wasn't it? A. Yes.

* * * * *

Q. Page 74 of the testimony you gave January, in 1964, six weeks ago, you were asked: "When you saw Dr. Robinson you took X-rays and then he gave what you said was hydrotherapy. You put your foot in a container of water of a specified temperature. Right?" And you said, "Yes." "Did he put your foot or leg in a cast then?" "Answer: No." "Did you require crutches then?" "Answer: No, I did not."

Do you remember giving that testimony? A. If it's there I must have given it.

Q. Now, you used the crutch for several months and when you put it away, what did you use? A. I had a small piece of lattice wood.

Q. Yes, I'm going to read that testimony to you and see if you agree that that is an accurate statement. A. Pardon?

273 Q. I'm going to read that testimony to you about that little stick. A. I said a piece of lattice.

Q. We'll see what the testimony says in a minute.

I understood you to say that you were under Dr. Robinson's care this morning at intervals up until you fell again in September? A. I said, Mr. Connolly, if I might repeat – I said about six or seven weeks after I was discharged as improved I re-injured, or twisted my foot and I had to go back for treatment.

Q. That was in September, wasn't it? A. But I still – yes.

Q. That was in September of 1958? A. Yes, when I had –

Q. When you twisted your ankle? A. Twist, yes.

Q. Now, Dr. Robinson discharged you in late or middle July? A. Yes.

Q. He discharged you as improved, right? A. Yes.

Q. And what was the condition of your ankle at the time? A. I was still having trouble with my ankle.

274 Q. Was it still swollen? A. Yes, slightly.

Q. And you were unable to put weight on it? A. All my weight, yes.

Q. It was still swollen? A. Slightly.

Q. Well, let me ask you this. Question, page 98: "Last Thursday didn't you say that after Dr. Robinson discharged you in July that you didn't have any swelling?" "Answer: As improved." "I know he discharged you as improved. Didn't we establish that you didn't have any swelling?" "Answer: The swelling had gone down some but it was still swollen, sir." "Was it down or was it not down?" "It was down, sir." "Was it down so far no one could notice it?" "You could notice it, sir." "Could?" "Answer: Could a little. Yes, sir." "Could Dr. Robinson notice it?" "Yes, he could." "In September it was swollen still or would the swelling come and go?" "The swelling comes and goes." "On the

occasion of this fall that you had in September had the swelling come upon it at that time?" "I didn't understand, sir." "When you had this fall or when you had this incident in your home in September 1958, when your foot gave way, had the swelling come up at that time?" "It was still swollen; just a little; not like it was." "Did it hurt you to walk on your ankle at that time?" "It
275 did, sir." "Were you using any assistance in walking? By that I mean a cane or crutches?" "Answer: Crutches." "You were using crutches in September 1958?" "At times." "The pain was so severe and you were so unable to walk on your right foot in September of 1958 that at times you had to use crutches?" You say, "I am sorry, sir. I had a little stick like, that I used. That was in 1958. But I did use crutches." "Question: When did you use crutches?" "After Dr. Robinson put the cast on." I say, "No. The cast, we established last Thursday, came off in July." "Answer: But I did use them after—" "How long after?" "I don't recall, sir." "Were you still using them when Dr. Robinson discharged you as improved?" "Answer: Yes." "Still using them. Still unable to get about without using crutches, and he discharged you?" "Answer: I could get about but I could not put all my weight on my foot." "That being so he nevertheless still discharged you; is that correct?" "Pardon?" "He still discharged you even though you could not put all your weight on your right lower extremity?" "Yes." "You used these crutches after being discharged in July, 1958, for how long?" "I don't recall, sir." "A week, two weeks?" "I don't recall, sir." "Now, in September you had this fall at home; the incident when your foot gave way at home. Now, were you still using crutches at that time?" "What is that?
276 '59?" "No, ma'am. '58." "Oh, '58." "We are still talking about the second incident?" "Answer: No, I was not using the crutches. I said I was using a little stick like, at times."

Do you remember giving that testimony? A. Yes; I do.

Q. Is that testimony true? A. Yes.

Q. Is it still true? A. Yes.

Q. All right, now, if that testimony is true then you were inaccurate in saying you left Dr. Robinson's office and went to get crutches after your

first visit on the 16th of June, were you not?

You didn't get crutches until after he put the cast on? A. He prescribed the crutches.

Q. That's not what you said, though. You said you went to a particular place and you bought crutches.

Isn't that what you testified to just a few moments ago? A. Yes; I did. Yes; I did.

Q. And having read that to you, is your recollection refreshed that you did not get crutches on the 16th of June after you left Dr. Robinson's

277 office? A. Mr. Connolly, that was six years ago.

Q. Mrs. Buggs – A. But this was in January when I made that statement.

Q. I agree. It's six years ago, and that's my whole point. You really don't know too much about what happened six years ago, do you? A. Yes, I do. I know exactly what happened.

Q. All right, now, did you get the crutches then after you left Dr. Robinson's office, or after he put the soft cast on in mid-July? A. I am trying to remember exactly when. I know the first visit he prescribed – he didn't prescribe; he just told me to get crutches. I didn't get crutches. I got a crutch.

Q. Do you draw some distinction between prescribing and telling you to get crutches? A. Yes, I do.

Q. What is the difference? A. Prescribe something is to write it down. He told me to get crutches, which he did not have to write on a pad.

Q. A few moments ago you used prescribe inaccurately – A. I am sorry, I did not mean prescribe.

278 Q. Now, when he discharged you, are you saying when he discharged you, you were still on crutches and unable to fully bear weight on your right leg and still swollen? A. In July?

Q. Yes. A. Yes.

Q. And nevertheless he still discharged you? A. As improved, I wasn't well, but improved.

Q. Well, we'll find out what Dr. Robinson means by that word, but he discharged you, told you he didn't want to see you any more? A. He did not say that.

Q. Well, he discharged you, didn't he? A. He discharged me as improved.

Q. Did he tell you he wanted to see you again? A. He didn't say anything. He just said, "You are discharged as improved."

Q. Discharged, and you didn't have any appointments, did you? A. I didn't at that particular time, I didn't have –

Q. You didn't expect to have any, did you? A. I was hoping that I wouldn't have to.

Q. You thought you were finished with Dr. Robinson, didn't you? A. No; I did not, because I was still –

279 Q. When he told you to go, that you were discharged, you thought you were going to have some more trouble with him? A. He used the word "improved." He didn't say that I was well.

Q. He used it how? A. "You are discharged, Mrs. Buggs, as improved." He did not say that I was well and don't come back.

Q. He didn't say he wanted to see you again, did he? A. He didn't have to make that statement.

Q. All right, we will find out from Dr. Robinson.

At any rate, up until September you would have this swelling that would come and go; is this right? A. Yes.

Q. And September you were using a little stick like? A. Not at all times.

Q. Let me read your testimony, and I am going to read it and I want you to tell the jury whether this testimony is true: "I was not using crutches" – this is September '58 – "I said I was using a little stick like, at times." "Question: You were using a little stick like." "Answer: Not a walking cane. It was just a – " "You were not using a walking cane?" "No, it was a stick I had there in the house." "What kind of a stick?" "Just a little round – something like a broom stick. It wasn't a broom

stick. It was just a small – " "Where did you get it?" "Where did I get
280 it?" "Yes." "At home." "From what?" "Where did I get the stick?" "Question: I know where you get a broom stick. You get it from a broom. Where did you get this stick?" "Answer: From wood we had around the house. It was just – it wasn't round. It was just a little piece of – not plywood but some type." "How little was it?" "It was about this wide. (Demonstrating.)" "About as big around as your forefinger on your left hand?" "No. About this wide. I don't know the type wood it was." "When you say 'this wide', I am not sure whether you mean this width or this width. (Demonstrating.)" You say, "I am speaking of one-half of my finger here." "It was about half as wide as your finger is thick?" "Yes." "It bent a great deal, didn't it? Did you put any weight on it?" "Pardon?" "That must have bent a great deal when you put weight on it, didn't it?" "Answer: I did not put much weight on it. It was something – I didn't use it all the time; just at times, sir." "Did you feel that you had to use this stick?" "At times when my foot was swollen because it swells right now, at times." "I asked you back in September 1958 did you feel that you had to use this stick." "At times." "And you can't describe any better what type stick it was other than about half an inch thick?" "Answer: It was something like a piece of lattice, I guess you would call it; lattice that you would use to put a ceiling on; latticework." "That is thin in one direction but, if I know
281 what you are speaking about, it's about an inch in other measurements." "Answer: I don't recall the exact width of it, sir." "What color was it?" "Brown, like wood." "Unpainted?" "Unpainted." "You don't know where you got it?" "At home. We had some wood around there my husband had been fixing different things with." "Carpentry?" "No. Just something. I don't know what he was doing with it. He had it there. I don't know what he was doing with it." "And you used this." "At times, sir." "Not a cane." "No, not a cane."

Now, do you recall giving that testimony? A. Yes; I do.

Q. Is that testimony true? A. Yes.

Q. What was this little stick like? A. It was like a piece of lattice that I kept in the kitchen. Many times when my foot was swollen, to keep

from putting all the pressure on it, if I had something in this hand, in my right hand to sort of hold on to, it wouldn't hurt me quite as badly.

Q. Now, you mean you didn't use it to walk with? A. No, I didn't use it at all times.

Q. Just to have a stick in your hand? A. No, I had it on the floor.

282 Q. You couldn't put any weight on it according to those measurements, could you, because it would bend right over? A. No, I had something in my hand – no, I didn't put too much weight on it.

Q. Now, there came a time in your case, did there not, Mrs. Buggs, when you developed a numbness? A. Yes.

Q. And it started in your great toe, in your bigtoe? A. Yes.

Q. Right. A. Yes.

Q. On your right foot? A. Yes.

Q. That did not happen right after the accident, did it? A. It happened within a month's time after the accident, a little better than a month after the accident.

Q. You noticed it after Dr. Robinson took the cast off, didn't you? A. More, more so.

* * * * *

283 Q. On page 74 of your testimony given in January – I have already read some of this testimony. It has to do with your first visit to Dr. Robinson. I asked you if you could bear weight on it and you said no. "Question: You did not at this time have any numbness of your great toe?" "At the beginning, no." "Question: You never noticed that condition until after the cast was taken off." "Answer: Yes." "So up until then you had no trouble with your big toe?" "Other than being swollen. The whole foot was swollen." "You don't have a recollection of having hit your big toe?" "No."

Page 88 – and now we are on the Monday following the weekend – "I understood you to say last Thursday that when this soft cast was taken off you began to notice some slight numbness in your great toe. Is that

284 correct?" "Answer: Yes, sir." "And as I recall you used the word

'slight'." "Pardon?" "As I recall you used the term 'slight'." "Yes, I did." "To refer to the numbness?" "Yes."

Now, do you recall that testimony? A. Yes, I do.

Q. Now, does that fix it that after the cast was taken off you began to notice some slight numbness in the great toe? A. Yes.

Q. Is that your best recollection today? A. Yes.

Q. All right. Now, this numbness then gradually spread; didn't it? A. Yes.

Q. Now, as I recall your testimony given on direct this morning, in answer to your list of complaints that you had, you recounted to the jury, you didn't talk about the numbness that you sometimes have now.

Is that an oversight? A. Yes, it was an oversight.

Q. You should have told the jury about that; is that right? A. Yes.

285 Q. You have times when you experienced numbness that goes now all the way up to your hip, don't you? A. The numbness is across my, half of my foot.

Q. Doesn't it sometimes come all the way up to the hip? A. At times.

Q. And it has a very peculiar distribution; doesn't it? A. Yes.

Q. In other words, if one were to make a mathematically straight line and cut the leg in half, one side of the leg lacks sensation and the other side has it; is that so? A. Yes.

Q. And it was because of the increasingly severe nature of the numbness in your great toe that prompted Dr. Ammerman to put you in the hospital and do disc surgery; isn't that right? A. Yes. Oh, I'm sorry, I didn't understand the question. I'm sorry, I didn't understand.

Q. You said it was because of the numbness you were experiencing in your great toe that prompted Dr. Ammerman to put you in Freedmen's Hospital and do disc surgery on your back? A. After five months of examination.

Q. The thing that concerned him most and what he talked to you about was the fact that this numbness in your great toe; isn't that so? A. No.

286 (Short pause in proceedings.)

Q. Because you had this persistent numbness in your foot, didn't Dr. Robinson send you to Dr. Ammerman? A. Yes, he did.

Q. All right, now, Dr. Ammerman operated on you and removed a disc, and the result was that the numbness didn't get better, it got worse; isn't that so? A. Over a period of time.

Q. Because you just had numbness in your great toe – A. And the middle toe.

Q. And the middle toe. A. Yes.

Q. And then when you recovered from the operation then the numbness began to spread and moved up the leg; isn't that right? A. Yes, slightly.

Q. What? A. Slightly.

Q. Now, let me read you your testimony: * * *

289 "And the division of sensation is such that if you were to split the leg exactly in half, that on the right would be less sensitive than that on the left?" "Yes." "At other times you have a lack of sensation over the entire leg up to the hip – pelvis."

Now, do you recall giving that testimony? A. Yes.

Q. And indeed that was one of your biggest complaints at the prior trial; wasn't it? A. About the leg?

Q. About this numbness in the leg? A. The leg and the foot.

Q. Yes. A. Yes.

Q. As a matter of fact, you kept attributing these falls you were having to the fact that you couldn't feel with the bottom of your foot; didn't you? A. I said that my ankle would give way – my foot would give way on me, Mr. Connolly, and twist because of the weakness.

290 Q. Didn't you testify in the prior trial that the reason you were having these falls, and specifically the one that you had that you fell down the seven steps of concrete, was due to the fact that you didn't have sensation on the ball of your foot? A. I said my toes, sir.

Q. All right. Didn't you also testify that you had trouble driving an

automobile because you didn't know how much accelerator pedal you had? Do you remember testifying to that? A. I remember saying that, yes.

* * * * *

338 Washington, D. C.
Wednesday, March 11, 1964

* * * * *

340 CROSS EXAMINATION (Resumed)

BY MR. CONNOLLY:

Q. Mrs. Buggs, at the conclusion of the testimony yesterday you will recall I was inquiring about the developing numbness in, first of all, your great toe, and then your foot, and then your leg, and we closed when I asked you if that wasn't a disability and you had overlooked it. Do you recall that? A. Yes, I do.

Q. As a matter of fact, at the last trial in January, this lack of sensation in your foot was your most significant complaint, wasn't it?

A. One of the most.

Q. And yet in the long narrative that you gave to the jury yesterday when you talked for almost half an hour, without interruption of any questions, to these ladies and gentlemen of the jury, you didn't once mention that, did you? A. I did not.

341 Q. Now, I had the reporter, Mr. Henderson, who was here yesterday, write up that narrative over night.

In that narrative you got to September of 1963.

"September of 1963, before September of 1963, in July of 1963, I went to Dr. Robinson because I was still having trouble with my back and foot. He prescribed a different brace for my back. In September of 1963 my foot twisted, turned. I lost my balance, fell backwards down seven flights of cement steps. I was placed into – the ambulance took me to Freedmen's Hospital for observation. When I arrived they made an examination. They made X-rays. I had no fractures, no lacerations, but I was there for five days for observation."

You say now, that in September of 1963, you suffered this fall which sent you to Freedmen's Hospital because you twisted your foot? A. Yes.

Q. On page 32 of your testimony given this past January, you were under examination by your own lawyer and you testified as to a fall in February of 1963. This question was asked by your own lawyer:

"Did you have any further falls since?

"Answer. September of 1963.

342 "Question. And will you tell us what happened then?

"Answer. I was in the back yard and I started down the cement steps that lead to the basement and the same right foot was on the landing. I thought I had it all the way on the landing and I did not and I lost my balance and fell backwards eight steps.

"Question. Did the foot fall asleep on that occasion?

"Answer. Yes."

Now, what is the fact? A. My foot gave way –

Q. In January – A. (Continuing.) – because of the numbness in my foot.

Q. It was both? A. The numbness is still there and it's been there.

Q. Yesterday you never even mentioned that but you say the reason why you fell down seven cement steps was because your ankle twisted. A. My foot gave way, Mr. Connolly.

Q. That's not what you said yesterday to the jury. You said: "In September of 1963 my foot twisted, turned. I lost my balance and fell backwards down seven flights of cement steps." A. That's from weakness, Mr. Connolly, in the ankle and in the foot.

Q. Did you testify this way yesterday? A. No, I didn't.

343 Q. So the reporter again has quoted you inaccurately, has he, when he says that you testified yesterday in your long narration to the jury: "In September of 1963 my foot twisted, turned." A. It's very hard to remember all of those small details, Mr. Connolly.

Q. I suggest to you these are not small details and by paying attention

to small details one can tell which is fact and which is not fact. A. It's a different way of expressing yourself.

Q. All right, ma'am.

Let me recall the testimony to you when you were under cross-examination on January 27, 1964, having heard the testimony you gave on direct. I asked you about the September 1963 incident on cross-examination.

Beginning at page 156 – I am going to start at 155: You were at the time describing each of the various falls you had had since this case started. I said:

"The next was in February of 1963?

"Yes.

"What happened then?

"I was coming down the stairs from upstairs, down into the living room, and I thought I had my foot all the way down on one
344 step and I did not. I lost my balance and I just slid down two or three steps into the living room.

"Question. Your foot didn't give way then.

"Answer. I thought I had it all the way down, because at times I don't know whether it is all the way down or not.

"Question. Your foot did not give way?

"Answer. I guess it didn't. I just thought I had it all the way down on the step and I made a misstep and just –

"Question. Now, how about September 1963?

"Answer. September 1963 I was standing on the top of the cement steps that lead to the basement and I thought I had the foot all the way down on the top part of the step, and instead half of it was on the top part and half was on the outer part as you would come down the steps. I lost my balance and I fell backwards eight steps and my head hit on the bottom of the landing as you go into the basement.

"Question. The foot didn't give way that time?

"Answer. I thought the foot was all the way down. It feels very heavy. I don't know when I have it all the way down on something and I don't.

"Question. Are you very careful about walking?

345 "Answer. I am very careful.

"Question. Do you watch where you put your foot?

"Answer. I do, sir.

"Question. But you didn't on these occasions; is that right?

"Answer. I thought I had it all the way down.

"Question. Did you see where your foot was?

"Answer. It was on the top part of the landing of the step.

"Question. But you just said it wasn't.

"Answer. I thought it was. Part of it was on there, sir, and part was on the outer part, the part that leads to the other step.

"Question. And did you look to see where your foot was?

"Answer. I don't look all the time to see where my foot is, sir, when I am walking or standing. Sometimes I think it is all the way down.

"Question. Even though you know from experience, you know that you cannot tell whether your foot is solidly on something or not?

"Answer. That's true. I have been driving a car for one year, since 1958; I started driving again. Many times I don't know; I have to watch the speedometer to see if I am going too slowly or too fast, because I don't have too much feeling in that foot."

346 Then, I asked you if you told the Department of Vehicles and Traffic. Now: (Reading from transcript of Jan. 27, 1964.)

"Question. Both in February and September 1963, you would not describe those accidents as situations where your foot gave way, would you?

"Answer. It is from the numbness of the foot.

"Question. How do you know it is from the numbness of the foot?

"Answer. Because I don't have the full use of my foot.

"Question. And that is what you say happened on those occasions?

"Answer. I thought I had it all the way down, because half of the foot is numb."

Do you recall giving that testimony? A. I do.

Q. Is that testimony true? A. Yes.

Q. Is that what caused you to fall in February of 1963 and in September of 1963? A. Yes.

Q. You didn't place your foot properly on the step on either occasion because you had numbness in your foot and you didn't know where
347 your foot was located? A. The foot is numb and at all times when I am walking I am very careful about walking, but when I am standing, accidents do happen, Mr. Connolly, and not the full feeling in half of my foot, it is possible that I thought that it was all the way down when it wasn't.

Q. Mrs. Buggs, look. These ladies and gentlemen of the jury can't tell what is possible. That's not the way to decide this case. You understand that. They have to know what the facts are and the only way they can know what the facts are is from the testimony of witnesses, and you are the only one who can tell these ladies and gentlemen of the jury — A. Mr. Connolly, I know how my foot feels.

Q. All right. Now, are we to conclude, therefore, —

MR. LAWSON: I object on two grounds. First, I think it is not proper for Mr. Connolly to say what the possibility is with respect to these jurors. Secondly, in none of the testimony which he has read has Mrs. Buggs said she didn't put her foot down. She said in every instance that he read she thought she put it down.

May I suggest this is far different than saying: I did not put it down but I thought I had put it down.

THE COURT: In the examination ask the questions without comment as to the effect of them with respect to the answers. Please proceed.

348 BY MR. CONNOLLY:

Q. Having read this prior testimony to you, are we to conclude now, therefore, that these two falls in 1963, occurred because you weren't conscious of where your foot was and you made a misstep and lost your balance? A. Yes. The numbness of the foot.

Q. Therefore, we are to disregard your earlier testimony that you fell on those occasions because you twisted your ankle, are we? A. I don't recall saying that, Mr. Connolly.

Q. All right. A. I don't recall saying that.

Q. You would not deny you did testify that way yesterday. A. I would not deny but I don't recall saying it.

Q. Now, this numbness started in your great toe.

Did you strike your great toe in the Safeway Store on June 11, 1958? A. I did not strike my great toe.

Q. Did you strike it in February of 1959, when you had the fall in your house and you called Dr. Lee and then Dr. Robinson came and you spent three weeks on the sofa bed? Did you strike your great toe on that occasion? A. My great toe – my toe – my great toe, when I twisted my ankle my foot gave way. I twisted my ankle. I was near a

349 chair and to keep from falling I grabbed the chair and my toe struck against the chair and I turned around and sat down in the chair.

Q. Now, here on March 11, you admit that you struck your great toe in February of 1959, do you? A. Well, my toes touched the dining room chair as I turned to sit down –

Q. Did it touch or strike it, Mrs. Buggs? A. Pardon?

Q. Is it a touch or a striking? A. Well, I would call that a striking if you hit it up against, lightly up against it, but my ankle had turned and to keep from falling, as I turned to sit down in the dining room chair it barely touched up against the – it struck up against the dining room chair.

Q. Do you recall my asking you in January about the history in the various hospital records concerning you? A. Yes.

Q. You do remember that? A. Yes.

Q. You remember I showed you what Freedmen's Hospital records say that you told them both on your admission in September of 1960, and your admission in September 1963, don't you? A. Yes.

* * * * *

350 Q. Let me refresh your recollection. Page 95 in your testimony of January 27, 1964, I asked you this question:

"Did you tell the doctor that took this first history last September in Freedmen's Hospital that you had had an incident five years ago in which you struck the instep of your right foot against the point of a platform in a local store; that you sustained a severe bruise, necessitating a cast being placed upon the foot and leg; several months later the patient hit the toe of her right foot against a chair causing her to fall backward into another chair?"

You said:

"That is not correct."

351 "Question. You did not tell the doctors that took you into Freedmen's Hospital that just last September?

"Answer. I did not.

"Question. That you struck your big toe against a chair?

"Answer. I did not fall, sir.

"Question. I am not as concerned with whether you fell. I want to know whether you told the admitting doctor at Freedmen's Hospital last September that several months after your Safeway incident, that you had struck the toe of your right foot against a chair?

"Answer. I did not say that, sir.

"Question. You deny saying that?

"Answer. I deny saying that, sir.

"Question. Did you do that?

"Answer. I did not, sir."

Mrs. Buggs, you just got through here a few minutes ago saying

you did strike your great toe against a chair. A. Mr. Connolly, I said my toe struck against the chair after I had turned my ankle and to keep from falling I turned around and sat down. I caught the chair, and as I caught the chair the back of the chair – here is the leg, and my big toe struck the leg of the chair, and I turned around and sat down in the dining room chair.

352 Q. Will you tell the jury why it is that when these questions were asked of you last January and you were under oath, you didn't make that explanation that you just gave? A. Because it was an oversight. There so many questions asked me. I could forget some of the questions and answers. I couldn't repeat the same thing.

Q. So that it wasn't just insignificant, I am going to read on:

"Question. In September of 1960, you were a patient in Freedmen's Hospital when Dr. Harvey Ammerman operated on your back; is that correct?"

A. Yes.

Q. I am reading your testimony. You said yes.

"Question. When you went into the hospital on that occasion they also took a history from you, did they not?

"Answer. Yes, they did.

"Question. Did you not tell the doctors at Freedmen's Hospital at that time as follows: 'One and a half years ago patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disc slipped out of place'." You said: "I did not say that, sir."

"Question. You did not say that. So you deny telling the admitting physician at Freedmen's Hospital on either occasion that you struck your toe.

353 "Answer. I don't remember having said that.

"Question. You deny that ever happened.

"Answer. I deny that ever happened."

A. I don't recall having said that, Mr. Connolly, the last statement that you made.

* * * * *

354 Q. Now, I will also ask you about February of 1959. I said:

"Question. Now, in February of 1959, you had an accident at home at which time you called Dr. Robert Lee, is that correct?

"Answer. Yes, I did.

"Question. He came to your house?

"Answer. Yes.

"Question. At that time did you tell Dr. Lee that you had hit your foot against the leg of a chair?

"Answer. I don't remember having said that.

"Question. Did that happen?

"Answer. I told him that I had – my foot gave way on me

355 and I went to the floor and sort of twisted my body.

"Question. Did you tell Dr. Lee that you struck your foot against the leg of a chair?

"Answer. I don't remember having said that, sir.

"Question. Did that happen?

"Answer. No, it did not, sir.

"Question. Would you deny having told Dr. Lee that?

"Answer. I would, sir."

Do you remember giving that testimony? A. I remember saying – making that statement.

Q. That testimony was false, wasn't it? A. It was not false, Mr. Connolly. I still say that my ankle turned, and I did strike my toe against the chair, as I turned to sit – grabbed the chair to sit to keep from falling to the floor.

Q. Mrs. Buggs, if that is your testimony today that you did strike your foot against the chair, isn't the testimony that you gave on pages 97 and 98, which I just read to you:

"Question. Did you tell Dr. Lee that you struck your foot against the leg of a chair?

"Answer. I don't remember having said that, sir.

"Question. Did that happen?

"Answer. No, it did not, sir."

356 Was that testimony not false? A. That testimony is not false, Mr. Connolly.

Q. Well, if that testimony is not false, then is the testimony that you did strike your foot against the chair false? A. It is not false, Mr. Connolly.

Q. Do you not recognize that striking your foot against a chair and not striking your foot against a chair are mutually inconsistent propositions? A. That happened after my ankle had turned, Mr. Connolly.

Q. Mrs. Buggs, had any place in the questions I have read to you differentiated between whether you struck your foot before or after you fell? A. You did not ask me that: before or afterwards.

Q. You were the one doing the description. Let me read it to you again. A. I understand it clearly, Mr. Connolly.

Q. I want to make sure you understand it. A. I understand it.

Q. At that time, speaking of February, 1959:

"Did you tell Dr. Lee that you struck your foot against the leg of a chair?

"Answer. I don't remember having said that, sir.

"Question. Did that happen?

"Answer. No, it did not, sir.

"Question. Would you deny having told Dr. Lee that?

357 "Answer. I would, sir."

* * * * *

358 Q. I show you Defendant's Exhibit No. 5, for identification, Freedmen's Hospital records. In the hospital chart, the history of present illness, the admitting physician quotes you as follows:

"This fifty year old negro female traces her present illness to an incident which took place approximately five years ago in June '58, in which she hit the instep of the right foot against the point of a platform in a local store. She sustained a severe bruise

necessitating a cast being placed upon the foot and leg. Seven months later the patient hit the toe of her right foot against a

359 chair, causing her to fall backwards into another chair. Soon afterwards she was unable to move."

Now, did you tell the admitting physician at Freedmen's Hospital in September of 1963 what the record quotes you as having told him? A. I don't remember having said the exact words.

Q. Are the contents of that quote true? A. I did hit my toe as I have said, Mr. Connolly.

Q. Are the contents of what I have just read to you true, whether or not you remember telling Freedmen's Hospital? A. Some of that I do remember having told him.

Q. I am not asking you whether you remember telling him or not. I am asking you whether the statements are nevertheless true, irrespective of whether you remember telling him. A. I remember saying some of that.

Q. No, ma'am. I am not asking you what you remember saying. I am asking you whether the statement I have just read to you is true.

In other words, did the things which you are purported to have said in there, did those things happen to you, as they are related? A. Yes, they happened.

360 Q. All right. Now, page 95 of your testimony of last January, I put this question to you:

"Question. Did you tell the doctor that took this first history last September in Freedmen's Hospital that you had had an incident five years ago in which you struck the instep of your right foot against the point of a platform in a local store; that you sustained a severe bruise, necessitating a cast being placed upon the foot and leg; several months later the patient hit the toe of her right foot against a chair causing her to fall backward into another chair?

"Answer. That is not correct.

"Question. You did not tell the doctors that took you into Freedmen's Hospital that just last September?

"Answer. I did not.

"Question. That you struck your big toe against a chair?

"Answer. I did not fall, sir.

"Question. I am not as concerned with whether you fell. I want to know whether you told the admitting doctor at Freedmen's Hospital last September that several months after your Safeway incident, that you had struck the toe of your right foot against a chair?

"Answer. I did not say that, sir.

"Question. You deny saying that?

"Answer. I deny saying that, sir.

361 "Question. Did you do that?

"Answer. I did not, sir."

Now, Mrs. Buggs, will you not recognize an inconsistency between what I just read to you and what you testified to no more than thirty seconds ago concerning these records? A. The doctor's report in the hospital –

Q. (Interposing.) No, ma'am. Answer the question. A. I am asking you if that is the doctor's report that you have, that you are speaking of, Mr. Connolly.

Q. Mrs. Buggs, you know that. We just went over it together.

A. You have two papers there. I don't know which one you are referring to.

Q. Mrs. Buggs, answer the question. Do you not recognize the inconsistency between your testimony I just read that you gave last January, and the testimony you gave these ladies and gentlemen of the jury a few moments ago with respect to these Freedmen's Hospital records? A. I remember saying –

Q. (Interposing.) Answer the question, please, Mrs. Buggs. A. Yes, Mr. Connolly, yes.

Q. You do recognize an inconsistency. A. I remember some of the things in there, Mr. Connolly.

362 Q. Which is true? A. I did strike my toe against the chair, as I have said.

Q. And the testimony you gave last January was false, wasn't it? A. No, it is not false, Mr. Connolly.

Q. You recognize an inconsistency, don't you? A. There is a possibility of an inconsistency.

Q. No, ma'am. No possibility. A. Well, you are being –

Q. (Interposing.) They are inconsistent, aren't they? A. They are not.

THE COURT: It seems to the Court you made your record on that. The jury heard all of the evidence and they are the ones to make the determination.

Let's proceed with the examination.

BY MR. CONNOLLY:

Q. Now, in September 1960 – again I am going to show you these same Freedmen's records – does not the history that you gave upon admission to Freedmen's Hospital in September 1960 state as follows:

"One and a half years ago patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disc slipped out of place."

363 Is that what that says? A. That's what that says.

Q. Now, did you tell the admitting physican at Freedmen's Hospital in September 1960 what he quotes you as having said? A. I said that.

Q. You did say that.

January 27, 1964, in this very court room, I asked you this question:

"Did you not tell the doctors at Freedmen's at that time as follows: 'One and a half years ago patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disc slipped out of place.'

"Answer. I did not say that, sir."

A. I said that.

* * * * *

368 Q. Mrs. Buggs, on February 1, 1959, did you tell Dr. Lee, when he came to your house, as follows: That you were proceeding from the living room into the dining room when suddenly your right ankle and foot gave way as you approached the chair, the right foot striking one of the chair legs, and in an attempt to right yourself you lurched forward and suddenly experienced excrutiating pain in your low back. The [pain] was so severe that the patient had to be carried to a couch by her husband. She remained unmoved until seen by me at which time she felt quite nauseated.

369 Did you tell Dr. Lee that in February 1959? A. There was a misunderstanding about the husband. My husband was not at home.

Q. Did you tell Dr. Lee that? A. I told Dr. Lee all but the husband. Dr. Lee put me on – in the –

Q. You told Dr. Lee everything but that about your husband.

A. Yes.

Q. Because your husband wasn't home. A. Yes, I did.

Q. Now, last January, didn't you testify as follows:

"Question. Now, in February, 1959, you had an accident at home at which time you called Dr. Robert Lee; is that correct?

"Answer. Yes, I did.

"Question. He came to your house?

"Answer. Yes.

"Question. At that time didn't you tell Dr. Lee that you had hit your foot against the leg of a chair?

"Answer. I don't remember having said that.

"Question. Did that happen?

"Answer. I told him that I had – my foot gave way on me and I went to the floor and sort of twisted my body.

370 "Question. Did you tell Dr. Lee that you struck your foot against the leg of a chair?

"Answer. I don't remember having said that, sir.

"Question. Did that happen?

"Answer. No, it did not, sir.

"Question. Would you deny having told Dr. Lee that?

"Answer. I would, sir."

Do you remember giving that testimony? A. I remember that.

Q. Is that testimony true or false? A. I remember saying – making the testimony, I left the chair – hitting my foot –

Q. Was the testimony – A. – against the chair – out.

Q. Was the testimony – no, ma'am.

You didn't leave it out. You denied it ever took place.

Is that testimony you gave in January – A. I don't recall denying that entirely, Mr. Connolly.

Q. No, ma'am. A. It's there, but I don't recall denying it. I don't recall that.

* * * * *

400 Q. Yesterday in the narrative that you gave you said, you told how you went to Dr. Robinson on the 16th, he put you on hydrotherapy and ultrasonic, and you said:

"Over the period of the month I suffered greatly, and after about seven weeks seeing him at intervals I twisted my ankle."

Did you twist your ankle? A. My foot gave way and my ankle twisted, yes.

Q. Yesterday you said to the jury you twisted your ankle about seven weeks after seeing him at intervals. Is that right? A. Yes.

Q. And that would be in September 1958? A. Yes.

Q. That is what you were talking about? A. Yes.

Q. On the morning of January 27, 1964, after a weekend, didn't this happen:

"Question. Mrs. Buggs, to orient you, myself and everyone else here, you will recall when we terminated last Thursday I was asking you about the second fall you had in your home in September 1958.

"I understood you to say that you had turned your ankle in your home and you had fallen on that occasion and that prompted you to go back to the doctor."

401 Mr. Atkinson, your lawyer, objected to the question, saying it was something you did not testify to:

"There was no testimony she twisted her foot. She said her ankle gave way."

Then, the Court said if it is important the reporter can get his notes. He went and got his notes of the preceding Thursday and sat down and read them.

Do you remember that? A. Yes.

Q. I said:

"Mrs. Buggs, I am going to ask the reporter to read to you a portion of your testimony which he took down here last Thursday.

"He is going to read it to you and when he is finished let him go back to his place and I want you to tell the ladies and gentlemen of the jury whether that testimony is true or not."

This is what the reporter read:

"Question. You did not see Dr. Robinson again until you had another accident, did you?

"Answer. When I twisted my foot again.

"Question. You say you twisted your foot again?

"Answer. I meant twisted my foot. I am sorry, sir.

"Question. Because you did not twist your foot in the Safeway Store. Have we established that?

402 "Answer. I am sorry. Yes."

Then I asked you:

"Is that testimony true or not true?

"Answer. I don't remember having said that, sir. I remember having said that my foot gave way twice. I fell four times. Twice my foot gave way and I went down to the floor. Four times I fell when my foot gave way.

"Question. Mrs. Buggs, what I want you to answer is this: Is that testimony which the reporter just read to you true or not true? You can say yes, no, or I don't remember.

"Answer. It is not true."

Do you remember giving that testimony? A. I don't remember saying that, Mr. Connolly. I don't recall making those exact statements – that exact statement.

Q. Let me read it:

"You say this morning that your foot gave way?

"Twice.

"We are talking about September 1958.

"September 1958, my foot gave way.

"Question. Now, how did your foot give way?

"Answer. I was walking across the floor and all of a sudden

403 it just went down. It does that right now.

"Question. What went down?

"Answer. I could be walking across the floor like this and it gives way and I will sit right down on the floor and it did that twice. And four times –

"Question. Hold on. We are talking about September 1958.

"September 1958.

"Question. You mean you were walking across the floor and your right foot – you just couldn't bear weight on your right foot and you collapsed? Is that right?

"Answer. Well, sometimes it just –

"Question. No, ma'am. Just confine it to September 1958. Is that what happened on that occasion?

"Answer. Yes, sir.

"Question. You put weight on your right foot and your right foot would not sustain your weight and you fell to the floor?

"Answer. I did not fall. I just sat down on the floor.

"Question. So you did not twist your ankle on this occasion?

"Answer. I did not, no, sir."

Do you remember giving that testimony? A. I remember that,

404 Mr. Connolly, whenever your foot gives way your ankle twists. When your foot turns, that's what I meant.

Q. If that is so, why did you deny you twisted your ankle? A. Because you had me confused about the questions you were asking me. My foot gave way. Whenever your foot gives way your ankle is going to twist, you are going to turn your foot.

* * * * *

409 Q. You had an incident in the Safeway Store in June of 1958. In September of 1958, you had an incident at home when something happened. A. I twisted my ankle and my foot gave way.

Q. Gave way or turned or something. A. Yes.

Q. In February of 1959, you had another incident like that. A. Yes.

410 Q. And that time you twisted your back. A. Yes.

Q. And you say you went to bed for three weeks. A. I went to bed for three weeks.

Q. Now, between that time and the time you went into Freedmen's Hospital for an operation, did you have any more incidents? A. Between – you mean between 1959 and 1960?

Q. Yes, ma'am. A. I don't recall.

Q. After September of 1960 did you have any incidents when you twisted, you fell down, your foot gave way, or you lacked sensation in your foot, something happened to cause you to fall? A. Yes.

Q. When? A. July of '61.

Q. What happened then? A. My foot gave way. I did not fall. I came near falling but just turned. My ankle turned. In March of –

Q. (Interposing.) Is this a true statement – A. Yes.

Q. Wait a minute. Is this a true statement:

"What happened in July 1961?

"I was coming out of the kitchen into the dining room into the

411 living room and my foot gave way and I sat right down on the floor."

A. I didn't fall. I sat down. There is a difference between falling and sitting down, Mr. Connolly.

Q. People don't usually walk across the room and immediately sit down on the floor, do they? A. If your ankle gives way you do.

Q. Wouldn't you call that a fall? A. I wouldn't call it a fall.

Q. Go ahead. When is the next one? A. March of '62. My foot gave way.

Q. Going back to July, did your foot give way then? A. Yes.

Q. No twist? A. Or twist. My foot gave way and whenever your foot gives way you are going to twist your ankle, Mr. Connolly.

Q. That wasn't due to numbness. A. My foot is still numb, Mr. Connolly.

Q. But the incident that took place wasn't due to numbness. A. How could I say that? It is numb and it is very sensitive, and it is weak.

Q. March of 1962, what happened then? A. The same thing occurred. My foot gave way. You can be walking across the floor or on the sidewalk and your foot could give way from weakness.

412 Q. Did you twist your foot then? A. Yes.

Q. What about this testimony, page 155:

"What happened in March of 1962?

"Answer. The same thing. The only thing, I was upstairs then.

"You did not twist your foot?

"I did not twist it.

"Or ankle?

"I did not."

What about that testimony? A. Whenever your foot gives way, Mr. Connolly, you are going to twist your ankle. I may not have said it there, but –

Q. Why didn't you say it? Can you offer an explanation for not saying it? A. I don't know why I didn't say it, but it was possible.

Q. When was the next one? A. February of '63. February of 1963. I was coming down the stairs and I thought my foot was all the way on the steps. And I lost –

Q. Your foot didn't give way that day, did it? A. From the

numbness of my foot, Mr. Connolly. Sometimes I can't tell. My foot is
413 not entirely numb, but I do have impaired sensation.

Q. How about this testimony? Is this accurate? A. Yes.

Q. Wait a minute. Let me read this:

"The next was in February of 1963.

"Yes.

"What happened then?

"I was coming down the stairs from upstairs, down into the living room, and I thought I had my foot all the way down on one step and I did not. I lost my balance and I just slid down two or three steps into the living room.

"Your foot didn't give way then.

"I thought I had it all the way down. Sometimes I don't know whether it is all the way down or not.

"Your foot did not give way?

"I guess it didn't."

A. That's what I said.

Q. Is that true? A. Yes.

Q. The next one was September 1963. A. Yes.

414 Q. What happened then? A. I was outside in the yard. I was standing on the top of the landing of the steps. And I thought my foot was all the way down on the landing – on the landing, and half of it was on the landing and half was on this part that comes down to the steps and I fell. I lost my balance and I fell backwards.

Q. Yesterday, in your narrative statement to this jury, you said:

"In September of 1963 my foot twisted, turned."

A. I said that my foot gave way. I thought I had it down on the landing. That was in 1963; September of 1963.

Q. Not very long ago, is it? A. Pardon?

Q. That's not very long ago, is it? A. No, it hasn't been. September of 1963.

Q. Yesterday didn't you tell the jury that your foot twisted? A. I don't recall having said that it twisted.

Q. In January, did you testify as follows:

"Both in February and September 1963, you would not describe those accidents as situations where your foot gave way, would you?

"It is from the numbness of the foot."

Do you recall so testifying? A. Yes.

* * * * *

417 REDIRECT EXAMINATION

BY MR. LAWSON:

Q. Mrs. Buggs, stripped of alleged inconsistencies, and there are some; stripped of previous testimony in the deposition and in the transcript; did you or did you not on June 11, 1958, strike your instep in the Safeway grocery store at Eighteenth and Hamlin Streets, Northeast, on a platform similar to the one on exhibit here yesterday?

A. Yes, I did.

Q. * * *

What, if anything, caused you to twist your ankle, as you testified, on several occasions, if anything?

What, if anything, caused you to twist your ankle, as you testified?

A. I am sorry. I don't quite –

Q. What caused you – A. The weakness of my foot.

Q. On each of those occasions? A. Yes.

* * * * *

421 Q. Mrs. Buggs, have you ever fallen down or stumbled as a result of the numbness in your toes or foot? A. Have I ever fallen?

Q. Yes, because of the numbness or was it because of the so-called weakness –

MR. CONNOLLY: Which is it?

MR. LAWSON: I am asking both.

Q. (By Mr. Lawson) Was it weakness of the ankle or numbness of the toes? A. The weakness of the ankle.

* * * * *

438 Wednesday, March 11, 1964

* * * * *

440 DR. HENRY S. ROBINSON, JR.

* * * * *

DIRECT EXAMINATION

BY MR. LAWSON:

Q. Dr. Robinson, will you state your full name and address.

A. Henry S. Robinson, Jr., 1742 Sixth Street, Northwest.

MR. LAWSON: Mr. Connolly, will you stipulate his qualifications?

MR. CONNOLLY: Yes; qualified as an orthopedist.

BY MR. LAWSON:

Q. Doctor, did you have occasion to treat the plaintiff here, Mrs. Maggie Buggs? A. Yes, I did.

Q. Will you tell us when you first saw her and what you treated her for? A. I first saw Mrs. Maggie L. Buggs, 4103 Eighteenth Place, Northeast, on the 16th of June, 1958.

History: Patient stated that she injured her right ankle in a Safeway Store on the 11th of June 1958; platform was in the aisle and her

441 right ankle struck it and she fell to the floor. She had treated her ankle at home but it had gotten no better. She struck her knee at the same time, she said, but that was giving her no trouble at that time.

Q. Did you have – did you recommend use of a crutch at that time or shortly thereafter? A. Yes. After the examination, and I had examined it, applied ethyl chloride spray and strapped it with an Ace bandage and ordered crutches.

Q. Did there come a time you put her leg or foot in a cast? A. It was a gelo cast; not a plaster cast. A gelo cast is a –

THE COURT: What is it?

THE WITNESS: Gelo cast. G-e-l-o c-a-s-t. It is an appliance or bandage like, that is impregnated with medicine and it dries out and it gets hard. It doesn't get hard like plaster. It is not as heavy but it gives support and the patient can put a little weight on it.

BY MR. LAWSON:

Q. How long was that cast on her foot? A. We removed the gelo cast on the 11th of July 1958. At that time the swelling had subsided and we ordered hydrotherapy treatments; that is physiotherapy and the whirlpool and ordered an ankle support.

442 Q. Did there come a time you discharged her? A. On the 16th of July, 1958, Mrs. Buggs stated that the foot and ankle feel fine but the ankle was weak. She was advised to continue the wearing of the ankle support. We discharged her on the 16th of July 1958.

Q. From the time you first saw her, June 16th, to July 16, about a month, you saw her frequently or infrequently? A. Yes, sir. I saw her on the 16th of June, 17th of June, 18th of June, 19th of June, 20th, 23rd, 26th, 30th, and the 11th of July.

Q. Did there come a time you saw her again, subsequent to July 16, 1958? A. Yes. We saw Mrs. Buggs again on the 10th of September 1958.

* * * * *

443 Q. Doctor, tell us what vou did at that time. A. She stated that her – that on September 1st, 1958, she reinjured her ankle when it gave away on her. It began to swell. The pain was in the region of the anterior tibial tendon over the joint space.

The anterior tibial tendon – the tendon is what laymen call the leader. The anterior tibial tendon is one of the muscles that go down the front of the foot.

This is the ankle joint, here. (Pointing.)

Q. Doctor, excuse me. Is that commonly called the instep? A. No, your instep is on the medial side of the foot, where people say the arch is falling. The instep is here. (Pointing.)

The pain radiated to the knee.

Examination revealed swelling about the ankle joint, with exquisite tenderness under and to the medial side of the lateral malleolus. The lateral malleolus is the outside of the leg, the small bone here called the

fibula; on the outer side. You can feel it there on the outside of the foot.

444 At that time she was wearing an ankle support and we started her on ultrasound treatments. That is a form of physiotherapy.

Q. Did you see her on February 2? A. February 2?

Q. Yes. A. What year?

Q. 1959. A. Yes. We saw Mrs. Buggs on the 2nd of February 1959. She stated that the night before her right ankle gave away on her and she slipped and experienced a sudden pain in the lumbar back. The lumbar back is the lower portion of the back.

And that she had been given emergency treatment by Dr. Robert Lee.

Patient was confined to bed.

There was limitation of motion of the spine in extension, flexion, lateral and rotary motion. These motions are bending forward of the spine and back. Bending forward is called flexion, bending back is extension, and to the side is lateral and turning is the rotary motion.

They were all limited and painful.

445 There was also paraspinal lumbar muscle spasm. Paraspinal means around the spine. The lumbar is this back region here. Muscle spasm is where muscles get tight and rigid like.

The best example I know for a layman is when you get a tightness over abdomen, a rigidity, and that is usually due to some pathology or soreness or pain underlying it. These muscles splint to protect.

The straight leg raising on the right was positive 35°.

The straight leg raising test is a test we do with the patient lying on the back. We raise the leg up and at 35°, which would be about half way, not quite halfway, with the patient lying, with his leg fully extended at a right angle, the patient complains of pain.

This is usually an indication of some pathology or some disorder in the back. It is usually pathognomonic in a ruptured disc.

By pathognomonic we mean there is certain evidence it is there. You can also get this in some other conditions.

We ordered bed rest for her, bed board, medication consisting of parathon with codeine, a muscle relaxant, and pain.

Then, we saw Mrs. Buggs again on the 18th of February 1959 at the office. She said she had been in bed since the 2nd of February. At
446 that time she stated that she felt better, the muscle spasm had abated, motion was not as restricted, but she complained of pain in the back radiating to the leg.

We ordered a lumbosacral belt, exercises and physiotherapy treatments, and moist heat.

Q. Doctor, do you remember in a little more detail what Mrs. Buggs told you when she came to you on February 2, 1959? A. As I say, she said she had been walking and suddenly the member gave away, she fell to the floor, and she had to call Dr. Lee.

* * * * *

Q. Can you tell us – will you tell us, if you can, what she told you on February 2nd, when you saw her? A. Yes. She said that the night
447 before, her right ankle gave away on her and she slipped and experienced sudden sharp pain in the lumbar back.

Q. Did you continue to treat her and, if so, how long after that time? A. We treated Mrs. Buggs up until October 1959.

We referred her to Dr. Harvey Ammerman, neurosurgeon, because of the continuing disability of her back and leg, and she was getting a weakness in the big toe of that leg which indicated to us that it was probably a ruptured disc that she had and that falls in the province of a neurosurgeon.

* * * * *

Q. Have you seen her since October 30? A. 1959?

Q. Yes. A. Yes. * * *

* * * * *

448 Q. When was the last time you saw her? A. You mean for treatment, sir?

Q. Yes, sir. A. On the 29th of July 1963.

Q. For what, if anything, did you treat her then? A. We didn't do any treatment for Mrs. Buggs at that time. She came in the office and told us she had had another belt and that she told us she was much improved at the time but still has pain and weakness in the ankle, and not much feeling in that leg. She came by to show me a new belt she gotten, I believe, at R&G Orthopedics up on K Street. That was on the 29th of July 1963.

Q. How much did you charge Mrs. Buggs, or Mr. Buggs, for this whole treatment? A. We rendered a bill in the sum of $400, sir.

Q. Is that charge fair and reasonable? A. Yes, I believe so. That includes office visits, home visits, and hospital visits.

MR. LAWSON: You may inquire, Mr. Connolly.

CROSS EXAMINATION

BY MR. CONNOLLY:

449 Q. Doctor, do you have your office records with you? A. Yes, sir. (Hands.)

* * * * *

Q. Doctor, this is an X-ray of the ankle taken – A. June 16.

Q. 1958. Right? A. Yes.

Q. And it is negative for fractures? A. Negative. Right.

Q. Any other bone pathology? A. No.

Q. Perfectly normal. A. As far as the bone goes; as far as fractures.

Q. That is all an X-ray shows, isn't it? A. That is correct, sir. * * *

* * * * *

451 Q. It looks to me, going through these records – I think I have given you back everything – you have written two reports in this case, have you not? The first one on July 22, 1958, to Mr. Richard Atkinson, and one on May 29, 1963, to Mr. Richard Atkinson. A. Yes, sir.

Q. Of course, as you know, Mr. Richard Atkinson is a lawyer, do you not? A. That is correct, sir.

Q. Looking at these records it appears that the first instance when you saw Mrs. Buggs was, as you have testified, in June 1958, and you run through, I think, nine visits, until the 16th of July, and then you stopped seeing her, and at that time the swelling had subsided, and you discharged her with an ankle support, and then in your report you said, did you not, that she was discharged on July 15, 1958, as improved? A. That's right, sir.

452 Q. Now, you then see her in September. And you see her on that occasion one, two, three, four, five times. Five times. Is that right? A. In September?

Q. Yes, sir. A. Six times. And not again until the 2nd of February.

Q. There are only five notations but apparently she came in one time and you didn't make a notation. A. That's right. She took a treatment.

Q. After that occasion the swelling subsided and you discharged her. Correct?

* * * * *

Q. On September 25th. Correct? A. Yes, sir. Except for weakness of the ankles, much improved. Discharged her.

Q. Now, then, the next occasion you see her is in February of 1959. A. Yes.

453 Q. And this is after that occasion when she twisted her back, * * *

* * * * *

A. That's right.

* * * * *

455 DR. ROBERT E. LEE

* * * * *

DIRECT EXAMINATION

BY MR. LAWSON:

Q. Dr. Lee, will you state your full name and address? A. Robert E. Lee, 3435 Benning Road, Northeast.

MR. LAWSON: Mr. Connolly, will you make the usual stipulation?

MR. CONNOLLY: I don't know Dr. Lee. I just met him in the corridor. What do you want to qualify him as?

MR. LAWSON: Just that he is a general practitioner.

MR. CONNOLLY: Oh, fine.

456 BY MR. LAWSON:

Q. Dr. Lee, have you had occasion to treat the plaintiff here, Mrs. Maggie Buggs? A. Yes, I have.

Q. Will you tell the Court and ladies and gentlemen of the jury when you saw her and why? A. May I refer to my papers, please?

Q. Yes. A. I saw Mrs. Buggs first as a patient on February 1, 1959, at which time she had fallen presumably from walking from the living room into the dining room, and she said her right leg had given away on her, her right ankle, I believe. And she had fallen, striking against a chair, and falling on to the floor.

When I saw her, however, she was lying on the couch in her living room, at which time I was called there to see her.

* * * * *

458 Q. Doctor, this is your original report. Is this your signature? A. Yes, it is.

* * * * *

459 Q. In your report you say: (Reading.)

Mrs. Buggs was proceeding from the living room to the dining room when suddenly her right ankle and foot gave away as she approached a chair, the right foot striking one of the chair legs and in attempting to right herself she lurched forward and suddenly

experienced excrutiating pain in the lower back. This pain was so severe the patient had to be carried to the couch by her husband. Now, you say you don't know whether her husband carried her or not. A. I did not see her being carried. I was not there at that time.

* * * *

Q. Did you see her subsequently? A. Professionally. I did see her subsequently, yes, at another date. At that particular time she was referred to her physician, her orthopedic surgeon at that time. I don't have the hospital records of this patient the next time I saw her. I only have a summary of that which I dictated.

* * * *

464 Q. Doctor, I am going to show you the hospital records from Freedmen's Hospital which are Defendant's Exhibit No. 5, and I am going to ask you to read only what you yourself wrote in this hospital

465 record. If you will, read it loud so the Court and jury can hear you. A. This is dated 9-22-63. (Reading.)

This 54 year old female is being admitted to hospital with acute low back pain, severe headache, and general body contusions. Patient fell at approximately 11:45 A.M. today, falling off six steps on to a concrete airway at the basement door of her home, striking her head on the concrete pavement. Patient did not lose consciousness but does complain of severe headache and lancinating pains in right leg and lower back. Patient was brought on bed board to the Annex at Freedmen's Hospital by Fire Rescue Squad.

Preliminary examination reveals a contused area of the occipital region of the scalp — correction — the tip of the area with slight hematoma formation. The twelfth cranial nerves appear intact. The upper extremities appear intact. Marked tenderness noted at the left sacro-iliac joint and opposite four and fifth lumbar vertebra. Sensation and movement in the left lower extremity is normal. The right lower extremity reveals hypoesthesia from the knee downward. This is said to have been present for two to three years, even before disc surgery in 1960.

466 Diagnostic impression: (1) There is a concussion, moderate, without focal neurological sign; (2) sprain severe left sacro-iliac joint; (3) general body contusions.

Suggest: (1) neurosurginal consultation prior to movement from bed board; (2) X-rays as indicated; (3) sedation; (4) symptomatic therapy.

The next date is 9-23-63.

Q. These are still in your own writing? A. My own writing. (Reading.)

Patient is doing well on second day. Has residual discomfort in low back, dull headache, no change in neurological findings. Physical medical consult is being ordered.

The next date in my writing is 9-26-63.

Patient is doing quite well on 4th to 5th hospital day. Has shown marked improvement. Still has sensory level near level of knee, right. Discomfort in both sacro-iliac areas and associated muscle spasm has decreased particularly on the left. Residual muscle spasm and deep seated soreness remains on the right.

Dr. Ammerman is to see patient at office. Patient will be discharged today. Refer to Dr. Ammerman for continued observation. Headaches still persist.

* * * * *

469 Q. Doctor, will you tell us briefly about your treatment of this patient in February of 1959? A. I have to refer in part to my record at that time. However, in the main, since it was only one day's treatment of her, she was given opiates, demerol, I believe, at that time and given parathon, which has some codeine in it. Both of these are really to relieve pain and relieve muscle spasm.

470 Q. Is that treatment related to a fall in the house? A. It was.

MR. LAWSON: That's all.

CROSS EXAMINATION

BY MR. CONNOLLY:

Q. Doctor, do you have your office records? A. I have no office records on this patient. I have never seen her in my office. I saw her once in my office. I beg your pardon.

Q. You wrote a report. A. Yes, and I can't find it.

Q. Dated May 29, 1963, to Mr. Richard Atkinson. A. Yes.

Q. This document here? (Handing.) A. Yes.

* * * * *

471 THE DEPUTY CLERK: Defendant's No. 6, for identification.

(Report of Dr. Lee dated May 29, 1963, was marked Defendant's Exhibit No. 6, for identification.)

* * * * *

473 Thursday, March 12, 1964

* * * * *

474 DR. HARVEY H. AMMERMAN

* * * * *

DIRECT EXAMINATION

BY MR. LAWSON:

Q. Doctor, will you state your name and address, please.

A. Harvey H. Ammerman. My office is at 730 Twenty-fourth Street, N. W., here in Washington.

MR. LAWSON: Mr. Connolly, do you wish to stipulate the doctor's qualifications?

MR. CONNOLLY: I stipulate the Doctor is a well-qualified neurosurgeon, if the Court please.

THE COURT: The Doctor's qualifications are conceded.

BY MR. LAWSON:

Q. Dr. Ammerman, have you had occasion to treat Mrs. Maggie L. Buggs, seated here? A. Yes, sir.

Q. Would you tell us when you first saw her and how many times you have seen her and what you treated her for? A. All right, sir.

475 Mrs. Buggs came under my care in May of 1960, by referral of Dr. Henry Robinson. At that time I saw her in consultation, did neurologic work upon her.

The history revealed, based on the patient's history she gave me, that she injured herself on June 10, 1958, when, in a Safeway Store she caught her foot on a projection and was thrown forward. As a result of this injury she injured her right ankle and right foot. This was followed by severe pain in the top of the right foot together with numbness in the right great toe.

As her pain persisted she came under the care of Dr. Henry Robinson, orthopedic surgeon, who subsequently referred her to me, and he treated her.

This injury occurred in 1958, and beginning about 1959, the history I have, the patient's right foot gave way and she twisted her back. This was followed by the persistence of low back pain together with radiation of the pain down into the right leg and foot. She then developed a foot drop on the right.

She was examined neurologically and this revealed a 52 year old patient, who gave the previously stated history.

The neurologic examination showed straight leg raising test to be positive on the right at 80° –

476 THE COURT: What was the date of this?

THE WITNESS: May 4, 1960.

Straight leg raising test was positive on the right at 80° and negative on the left. This is the test where the patient lies on her back and you lift up the leg with the knee straight, up to 90°. The patient is lying in this manner. This is the thigh and this is the leg. They come up like this in this manner. If there is no pressure on the nerve root the patient can ordinarily do this, without any particular difficulty. If there is pressure on the nerve root why then as you start to raise the leg up you stretch the nerve root across the low back, whatever is giving, causing the pressure and that causes pain to run out the leg, and that was present in this patient on the right and not on the left.

Knee jerks and ankle jerks – those are the reflexes of the knees and ankles – were normal. There was weakness of dorsi flexion of the right foot.

In other words, the patient was unable to lift the right foot up normally in this manner: Stand on her heels with her toes off the floor. She could do it satisfactorily on the left. There was weakness of dorsiflexion on the right foot.

477 There was marked tenderness over the lateral aspect of the right foot and hypesthesia over the medial aspect of the right leg and foot.

In other words, the outside of the right foot there was tenderness and on the inner aspect of the right leg and foot there was decreased sensation.

There was marked tenderness over the 5th lumbar vertebra and to the right of the 5th lumbar vertebra.

In other words, there was tenderness over the lower part of the spine, the lowest vertebral joint, and to the right of that.

The patient's pain became intractable, we couldn't relieve it with conservative treatment, she was hospitalized and on September 16, 1960, a myelogram was performed at Freedmen's Hospital. This revealed a herniated lumbar disc. She was operated on on September 20, 1960, at which time the extruded disc fragment was found at L4 on the right and this was removed.

Following surgery the patient's pain was greatly improved, although she continued to have some residual pain. Her foot drop remained unchanged.

We followed her in my office at regular intervals after discharge from the hospital, but she continued to walk with a limp because of the persistence of the foot drop on the right.

478 Because of the foot drop it became necessary in June of 1961, to prescribe a foot brace so she could carry her right foot in a neutral position, so she would have a normal gait. When she walked her toes would hang down to the right. That will give an unstable gait. So we put

a foot brace on her which would keep the foot in normal position so when she walked the toes would not hang down. This enabled her to walk in a more satisfactory manner.

Because of increased pain in her low back and hip she was given a prescription Norflex.

Norflex is a combined pain reliever and muscle relaxant.

We followed her in my office at regular intervals and by May 15, 1962, there was still a weakness of dorsi flexion of the right foot, but her foot had improved to the point she could now hold her foot in a neutral position. With that, she was able to bring it up to a neutral position.

At the time of her visit of September 10, 1962, she walked with a limp favoring the right lower extremity and she continued to be disturbed by numbness involving the right foot, particularly the middle toe and the toes lateral to it.

The little toe is the toe to the outside.

479 There was still some tenderness over the outside of the upper part of the top of the right foot. This area right here.

Sensory examination revealed a diffuse decreased sensation over the right foot and over the outside of the right leg. Here and here.

Her most recent visit to my office was on April 25, 1963. At that time she complained of pain in her right hip, right thigh, and top of the right foot.

There was still some lumbar tenderness and tenderness to the right of the lumbar area. There was some tenderness in her low back and to the right of that.

She still could not dorsi flex the right foot as well as the left. She could bring it up fairly well but it wasn't quite as good as the normal foot.

There was still some tenderness over the top of the right foot on pressure.

That was my final visit.

* * * * *

480 Q. Doctor, what do you mean by, for the ladies and gentlemen of the jury, you used the word foot drop. Will you explain that word in a little more detail?

* * * * *

A. When we walk we take a step forward. You lower your foot very slightly, preparing for the next step. This is the normal gait. You carry your foot high enough subconsciously, when it's off the ground it will not touch the ground.

If you have a foot drop, carrying it in the neutral position, the foot will hang down. That is a foot drop.

A person walking with a foot drop automatically lifts their leg extra high so they will not strike their toe on the ground.

If a person has some weakness of these muscles in the front of the foot, the foot will hang down part way, which is what Mrs. Buggs had.

481 By lifting the foot extra high, so as not to scrape the toe, she would do that.

The ankle brace is a brace which goes around here and has a spring on the foot so when you step you can bend forward like that. When you lift your foot off the ground for the next step, instead of the foot hanging down the spring automatically lifts it by itself to the neutral position, where the foot is at right angles to the ankle and leg and you walk like this and you don't scrape your foot.

* * * * *

483 Q. Doctor, would you please tell the ladies and gentlemen of the jury, by way of illustration and diagram, if necessary, just where Mrs. Buggs told you she injured herself in the first instance in June of 1958?

A. That's in June of '58?

Q. Yes. A. Well, of course, it's her ankle and foot. * * *

* * * * *

THE WITNESS: * * * Following the injury she had pain in this general area of her right foot and ankle, as I understand the description.

* * * * *

489 Q. Dr. Ammerman, do your records show you treated Mrs. Buggs after she had a fall in February of 1960? A. After she had a fall in February of 1960?

MR. CONNOLLY: 1959, don't you mean?

Q. (By Mr. Lawson) 1959. Yes. February of 1959.

* * * * *

THE WITNESS: Yes, sir.

* * * * *

BY MR. LAWSON:

Q. Dr. Ammerman, when you treated her as a result of that fall, what did she tell you? What does your history show, your records show?

490 THE COURT: You are speaking of the fall of February 1959?

MR. LAWSON: Yes, sir.

THE WITNESS: The patient's right foot gave way as a result of which she fell, twisting her back and this was followed by the persistence of low back pain, together with radiation into the right lower extremity and foot. Patient also developed a foot drop right after this difficulty in January or February 1959. That is my note.

BY MR. LAWSON:

Q. Did you treat her again as a result of this fall?

* * * * *

A. Well, I will have to answer it in this manner.

Just, the patient's pain became intractable and on September 16, 1960, we hospitalized her and began to take a myelogram.

* * * * *

491 Q. That is what I want to establish. Now, you performed a diskotomy. A. That's right. That is removal of the herniated disk. Sometimes we call it a lumbar laminectomy.

Q. What, in your opinion, caused the herniated disk? A. The fall.

Q. The fall? A. Yes, sir.

* * * * *

492 CROSS EXAMINATION

BY MR. CONNOLLY:

* * * * *

Q. When you testified in answer to Mr. Lawson's questions you practically verbatim followed this report, did you not? A. That is true. And I used my complete notes to fill in the details.

Q. Well, when you gave a history, you actually quoted right from here? A. Yes, that is correct.

493 MR. CONNOLLY: Thank you. I would like to have this marked as the defendant's next number, please.

THE DEPUTY CLERK: Defendant's Exhibit No. 7, for identification.

(Report of Dr. Ammerman dated May 27, 1963, was marked Defendant's Exhibit No. 7, for identification.)

MR. LAWSON: What is that?

MR. CONNOLLY: That is the report to Mr. Atkinson of May 1963.

* * * * *

BY MR. CONNOLLY:

Q. * * *

I am going to show you Defendant's Exhibit No. 5, for identification, which is the hospital records of Freedmen's Hospital.

I direct your attention to September of 1960. Would you look through there, please, * * *.

* * * * *

495 Q. Now you say Dr. Sidney Green, then your associate, signed the admitting history and the physical examination sheet; is that right? A. That's correct.

Q. Did you read it, Doctor? A. I am sure I read it.

496 Q. Now, the history in the hospital states that one and a half years ago the patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disk slipped out of place. Doesn't it? A. That's correct. That's what it says.

* * * * *

498 Q. Doctor, in the first paragraph – the second paragraph of your letter is a history, is it not? A. That's correct.

Q. And I notice the last sentence of that paragraph and you repeated it on the stand is that the patient told you that the right foot drop followed the difficulty in the beginning of 1959.

Is that right? A. Yes. That is correct.

Q. Now, your report also indicates that she, after the incident in June of 1958, she developed some numbness in the right great toe. Does
499 it not? A. That's correct. That is in the middle of the body of the second paragraph.

Q. And the language you use said: "This was followed" – meaning after she caught her foot on the projection – "This was followed by severe pain in the top of the right foot together with numbness in the right great toe."

Did she tell you that she had numbness in her right great toe immediately after this incident in the Safeway Store which she described, or do you know whether she told you it came on suddenly? A. (Pause.)

Q. I suggest there is nothing in your language to tell you one way or the other, is there? A. No. I was looking to see if I have a note. It doesn't comment on it either way.

Q. I take it you have no independent recollection. A. No. Dr. Robinson would have been the one who saw her at that time.

Q. Yes. You were brought into the case, Doctor, were you not, to treat her for her back difficulty. A. That is correct.

Q. Dr. Robinson was of the opinion that she had a disk problem which was in the field of the neurosurgeon, yourself, and that is why he
500 brought you into the case. A. That's the way I interpreted it. Yes.

Q. You treated her for awhile conservatively and when the pain persisted, you decided to operate. Is that right? A. That is correct.

Q. And Doctor, you did find some signs which would confirm the opinion Dr. Robinson had about a disk, did you not? A. That is correct.

Q. One of those signs was the straight leg raising test which you did. A. That is correct.

Q. You found that positive at 80°. A. That is correct.

Q. Another sign that you found was the numbness in the great toe. Correct? A. Well, the numbness in the great toe could either be due to ruptured disk or due to local injury. Either one could cause it.

Q. You didn't have an opinion one way or the other. A. At that time?

Q. Yes. A. I was guided by the myelogram in deciding to operate.

Q. I see.

501 So, so far as you were concerned the numbness in the great toe was not diagnostically significant? A. Alone I would not operate on that sign. Local causes could easily do it.

MR. LAWSON: I didn't hear his answer.

THE WITNESS: Local causes could easily do it.

MR. LAWSON: Excuse me, Your Honor, but I didn't understand the answer.

MR. CONNOLLY: Why don't we have my question read back and the Doctor's answer read back and I think it will be clear.

(Thereupon, the reporter read the question and answer.)

MR. CONNOLLY: Satisfied?

MR. LAWSON: Yes.

BY MR. CONNOLLY:

Q. Was the weakness in dorsi flexion diagnostically significant? A. Was it diagnostically significant?

Q. As to whether she had a ruptured disk or not. A. Yes, that is helpful.

Q. Was it your opinion, Doctor, that the weakness in dorsi flexion resulted from the rupture of the vertebral disk? A. Well, on the basis

502 of the history, yes. Because she developed the foot drop following the time she fell and twisted her back.

Q. A foot drop can also result from a laminectomy at the level

that you performed it, could it not? A. Could it result from a laminectomy?

Q. Yes. A. I never had one occur but it could. It is a theoretical possibility.

Q. But you are clear that this foot drop did not come from the operation? A. It was present in the examination in the office, so it would have to precede it.

Q. Did it get progressively worse following laminectomy?
A. As a matter of fact, it improved.

Q. Following laminectomy, however, the patient did develop a greater degree and distribution of parathesia and anesthesia, did she not? A. That is correct. Initially she did. That is not uncommon.

Q. Did these persist? A. For awhile. Then they improved.

Q. Did you see anything like a hysterical distribution? The distribution of these parathesia or anesthesia, did they follow any organic pattern or did they indicate any hysteria? A. I felt they followed a diffuse organic pattern. I think they were classically hysterical.

503

Q. And they resolved, did they? A. I will have to say they improved.

Q. The last time you saw her did she still have the complaints concerning these anesthesias and parathesias? A. Well, she had some anesthesia or hypoesthesia over the lateral aspect of the right foot, and considerable loss of sensation over the medial aspect, the inside of the right foot. That was the examination of October 1, 1963.

Q. Now, hypoesthesia is a word we have not defined. We have defined parathesia and anesthesia. What is hypoesthesia. A. Anesthesia is no feeling, hypoesthesia is decreased feeling, and parathesia is abnormal feeling.

Q. Is the distribution of the hypoesthesia you found on your last examination, is that consistent with what you would expect as the result of a laminectomy? A. No. Your question infers sensory changes due to laminectomy. I don't accept that. Were you to say do I feel their

distribution is the result of the course received from ruptured disk –

Q. That's what I mean. I wasn't attempting to fault your operation. A. The patient was improved. Speak freely here.

504 Q. What I meant was the process that led to laminectomy. I am sorry, Doctor. A. I would say the sensory changes were perhaps a little more than we usually see, but in the general distribution we not uncommonly see.

Q. In your opinion, Doctor, they are the result of the procedures which led to laminectomy? A. Correct.

Q. I take it, Doctor, you did not orthopedically treat or examine the ankle. You looked at the ankle and foot merely to see whether there were any diagnostic signs there that would lead you to the conclusion that she had a disk or didn't have a disk. A. That was my primary purpose.

MR. CONNOLLY: Thank you.

REDIRECT EXAMINATION

BY MR. LAWSON:

Q. Dr. Ammerman, will you explain a laminectomy? A. Laminectomy is a technical term for an operation on the spine, where part of the lamina is removed and it is a general term we use for disk operation.

MR. CONNOLLY: Is that the same term that Mr. Lawson used, diskotomy?

THE WITNESS: Diskotomy. That's right. A diskotomy is a specific type of laminectomy for the removal of a disk. They can give you

505 a laminectomy for other things, but it is a general term.

* * * * *

506 BY MR. LAWSON:

Q. Dr. Ammerman, will you tell us how much plaintiff's function, regarding – the last time you saw her – how the organisms involved her functioned the last time you saw her? A. Well, you mean the function of the right lower extremity.

Q. Yes. A. I would give the following answer. I would say it was in general, there was a considerable improvement from the long range point of view, since her ruptured disk has been removed. She still has some weakness of the right lower extremity as compared to the left; it's not as stable as the left; and she has these sensory changes which are this hypoesthesia and loss of sensation, which is very disagreeable, and also with the decreased sensation you are not quite as sure where you put your extremity; it still isn't entirely normal.

I would say the right leg held residuals which made it function in an inefficient manner compared with the normal lower extremity.

MR. LAWSON: That's all.

507 RECROSS EXAMINATION

BY MR. CONNOLLY:

Q. Doctor, in your opinion are those residuals the consequence of the nerve root pathology?

MR. LAWSON: I didn't hear you, Mr. Connolly.

BY MR. CONNOLLY:

Q. Are those residuals the consequence of the nerve root pathology that led to the laminectomy? A. Largely.

MR. CONNOLLY: Thank you.

MR. LAWSON: That's all.

THE COURT: The witness may step down. The witness may be excused.

* * * * *

507-1 MR. LAWSON: I would like to call Mr. Buggs, unless we could stipulate to the doctor bills of $400 and $500, the hospital bill and hospital record.

MR. CONNOLLY: I told you I stipulated, as to the amount. I have other problems.

(AT THE BENCH:)

MR. CONNOLLY: I still don't think there is any testimony in this case that any bill, or what portion of Dr. Robinson's bill is related to

the initial accident and what portion is related to the subsequent trouble this woman had, or whether the second trouble is related. There is no testimony that Dr. Ammerman's bill or her hospitalization is related to the initial trouble at the Safeway Store.

MR. LAWSON: I think there is.

THE COURT: Whether related to the difficulty at the Safeway Store, the injury suffered at the Safeway Store, is dependent upon the question of proximate cause and that seems to be a question of fact for the jury.

MR. CONNOLLY: May I be heard on that?

THE COURT: Certainly.

MR. CONNOLLY: It would be if there is any evidence. But no doctor has come forward and testified that any particular thing was wrong with this plaintiff's ankle and that as a result of that, as a matter of medical opinion, any subsequent occurrence was the result of
507-2 that ankle difficulty. You do not have any testimony.

Not one of these doctors has been asked his opinion as to proximate cause. Not one has been asked what was wrong with the ankle and whether what was wrong with the ankle as a matter of medical fact or opinion caused anything else to happen. The record is absolutely silent on that. I have been very careful about that. That is why my examination of Dr. Ammerman was short and why I had practically no cross-examination of Dr. Robinson at all.

MR. LAWSON: My recollection is all of them said that these falls resulted from a weak ankle which resulted from the injury.

THE COURT: I am going to take the position that the jury can determine this from all the evidence, whether there is any connection between the subsequent pathology of the plaintiff in any respect, the weakening of the ankle; whether the injury at the store caused her to suffer any result of the fall or whether the difficulty of the back, the disk trouble and all the trouble in the lumbar region that has been testified to, or any region of the back is connected with the injuries suffered at the store

on June 11, and that is going to be a question of fact for the jury which can be argued to the jury.

507-3 The Court does not feel it would be proper to rule out any evidence of the bills because there has not been a specific connection between the accident and the treatment that resulted in the bills. I think those are questions for the jury and this can be argued to the jury, and there is evidence here on the matter that counsel for the defendant has adverted to which he can use in presenting his argument to the jury, and the Court will instruct the jury that the plaintiff can recover only for any injury which, or damage which is shown by a preponderance of the evidence proximately to have resulted from the injury, the accident of June 11, 1958 in the Safeway Store.

I think that covers the situation.

* * * * *

MR. CONNOLLY: Your Honor previously excluded these bills because there was no foundation laid on the basis of the medical testimony –

THE COURT: That is –

MR. CONNOLLY: Just a moment, Your Honor. Let me finish.

507-4 THE COURT: Let me interrupt you. I don't want you to misquote my reason. I think I can say the reason I excluded them –

MR. CONNOLLY: Your Honor, let me –

THE COURT: The reason I stated was that there was no doctor to testify as to those bills. That is the reason.

MR. CONNOLLY: Now, Your Honor, –

THE COURT: Now there has been a doctor here to testify since.

MR. CONNOLLY: But he has not testified that the treatments rendered were made necessary –

THE COURT: That is a question –

MR. CONNOLLY: Please let me finish, Your Honor, so I can make my record.

THE COURT: Go ahead. Make your record.

MR. CONNOLLY: He has not testified those charges were incurred as a result of disability sustained proximately from the first accident.

That is why those bills were kept out earlier. I don't know whether Your Honor used that but that was the only legal ground for keeping them out.

THE COURT: I have to disagree with you there. There was no medical testimony at the time they were submitted.

MR. CONNOLLY: Medical testimony of what character?

THE COURT: Of any character –

MR. CONNOLLY: No, it has to be a particular type of testimony.

507-5 THE COURT: The doctor had not testified at that time.

MR. CONNOLLY: I repeated that twice. Based on your ruling there had to be medical testimony to connect the doctor bills with the negligence of the defendant.

I did not examine Dr. Robinson and Mr. Lawson never asked Dr. Robinson: Describe what was wrong with this woman's ankle. There is no opinion or diagnosis what was wrong with this woman's right ankle from Dr. Robinson. He never asked Dr. Robinson one of the questions you always ask a doctor: To express an opinion on causation as to whether any subsequent disability was due to any condition he found. For that reason I did not cross-examine Dr. Robinson, for the reason I wasn't going to prove on cross-examine some critical material which Mr. Lawson left out. So I waived Dr. Robinson off the stand with only a few questions. I put hardly any questions to Dr. Lee. Dr. Ammerman has not testified what was wrong with the ankle originally. There has been no testimony in this record about any subsequent fall resulting from any condition resulting from the defendant's negligence.

It is true the plaintiff says, "My ankle gave way." But there is no explanation for that.

507-6 That is not sufficient and if Your Honor rules that this jury – which Your Honor has in effect ruled – that this jury can consider whether the subsequent accident and disabilities are the result of the initial condition caused at the Safeway Store, without any medical testimony, I am surprised, and since I am surprised and since I tried my

case on the theory that medical testimony had to be required, and since Your Honor ruled earlier in the case when you excluded testimony as to the medical bills because there had been no medical testimony, I am surprised and prejudiced, if that is the theory on which it is going to be submitted to the jury.

I ask permission to get Dr. Robinson back here and cross-examine him and I request a mistrial.

THE COURT: I am not going to grant your request. I think you have misconceived the Court's view. When the bills were presented there had been no medical testimony. They were presented. I said to wait until the doctors come and testify about the services. I did not go into detail as to how I was going to break down their bills and I never led you into that. If you have been misled it has been your own analysis of what the Court said and you never advised the Court of that.

MR. CONNOLLY: That isn't accurate.

THE COURT: It is accurate in my mind.

MR. CONNOLLY: Your Honor, let me finish.

507-7 THE COURT: If you want to talk go ahead and I will sit back.

MR. CONNOLLY: The only ground I urged on Your Honor for the exclusion of those bills was that there was no testimony that the services were proximately caused by the accident at the Safeway Store.

THE COURT: The question of whether they are caused proximately by the accident in the Safeway Store is for the jury under all the evidence, the testimony on all the evidence, and that is the way I rule.

MR. CONNOLLY: There must be some medical evidence.

THE COURT: There is evidence.

MR. CONNOLLY: That is my point.

THE COURT: Your point is made. I don't agree with you.

* * * * *

THE COURT: * * * I don't believe it is necessary. I think this case can be submitted to the jury on the question of proximate cause on the basis of the entire record, including the doctors' testimony. That is the Court's ruling.

* * * * *

507-9 MR. LAWSON: I would like to mark Dr. Harvey Ammerman's bill as Plaintiffs' Exhibit 4, and mark it in evidence.

THE DEPUTY CLERK: Plaintiffs' Exhibit No. 4, for identification.

(Bill of Dr. Ammerman was marked Plaintiffs' Exhibit No. 4, for identification.)

MR. LAWSON: And Dr. Robert E. Lee's bill of $40, as Plaintiffs' Exhibit No. 5, and Freedmen's Hospital bill, two bills totalling $312. Put that together and make it Plaintiffs' Exhibit No. 6. I would like to offer as Plaintiffs' Exhibit No. 7 checks No. 264 and 611 and 1172, the payee being Roger Surgical Appliances and Supplies, the payee being Roger Surgical Appliances and Supplies, and the R & G Orthopedic Supplies, signed by Dr. Buggs in the amount of $16.53, $34.68, and $45. And Plaintiffs' Exhibit No. 8 –

THE DEPUTY CLERK: That is No. 2, sir. It is in this case.

507-10 MR. LAWSON: It is already in?

THE DEPUTY CLERK: Not in evidence. Just for identification.

MR. LAWSON: I would like to offer all of those exhibits in evidence. It is my understanding there is no objection.

MR. CONNOLLY: It is your understanding what?

MR. LAWSON: It is my understanding there is no objection as to the amount.

MR. CONNOLLY: That's right. I stated my objection at the bench.

THE COURT: Plaintiffs' Exhibits Nos. 2, 4, 5, 6, 7, received in evidence.

(Bill of Dr. Lee was marked Plaintiffs' Exhibit No. 5; two Freedmen's Hospital bills were marked Plaintiffs' Exhibit No. 6; three checks for surgical and orthopedic appliances were marked Plaintiffs' Exhibit No. 7, all for identification, and together with Plaintiffs' Exhibit No. 2, heretofore marked for identification, were received in evidence.)

* * * * *

507-15 MR. CONNOLLY: I move Your Honor to strike from the record and instruct the jury that they should not consider any item of damage or injury subsequent to, say, August 1958, on the ground that the incidents of September 1958, February 1959, the falls in March and July of 1962 and 1961, respectively, and the fall in September 1963, have not been proven to have been proximately caused by any disability resulting from the first incident at the Safeway Store. There is an absence of credible substantial evidence by which the jury can find any of those
507-16 injuries, damages, or disabilities was the proximate result of the earlier 1958 incident.

THE COURT: That motion is noted and the motion is overruled.

* * * * *

507-17 THE COURT: Counsel may proceed.

MR. CONNOLLY: Dr. Murphy, please.

Thereupon,

DR. JAMES PETER MURPHY

* * * * *

DIRECT EXAMINATION

BY MR. CONNOLLY:

Q. Doctor, will you state your full name. A. James Peter Murphy.

* * * * *

A. 1904 R Street, Northwest.

* * * * *

507-18 Q. Do you practice any specialty in the field of medicine?

A. Neurology and neurological surgery.

* * * * *

507-19 Q. Doctor, at the request of the defendant in this case did there come a time when you had occasion to examine Mrs. Maggie Buggs, the lady who is seated here? A. Yes, sir.

507-20 Q. When did that examination take place and where did it take place? A. On January 20, 1964, in my office.

* * * * *

507-21 Q. Now, I take it you asked Mrs. Buggs what her complaint was and got her history. A. That is correct.

Q. What did she tell you? A. The patient stated to me that at the time of my examination her chief complaint was, "Absence of the full use of my right foot and toes and sensory loss as well."

She also complained she had pain in her back.

* * * * *

Q. Did she relate her complaints to any series of events? A. The series of events, according to the patient began when she injured her right ankle and foot in a Safeway Store June 11, 1958.

507-22 She was treated then by Dr. Henry S. Robinson, whose report reflected that he treated a "traumatic hemosynovitis of the right ankle" and he discharged her on July 16, 1958, as improved.

She was again seen by Dr. Robinson on September 10, 1958, at which time she stated she had recently fallen.

* * * * *

A. She further stated on February 1, 1959, she was examined at home because of severe pain in the back which was attributed to – the report says fire. Actually, what I meant to say, of course, was fall. Which occurred in her home when suddenly the right ankle and foot gave way.

She returned to Dr. Robinson thereafter, was admitted to Freedmen's Hospital. A myelogram was said to have been performed on September 16, 1960. It was also stated she was operated on four days later, at which time a ruptured disk was said to have been removed.

The patient stated that there was weakness of her foot, that is, the right foot, which had developed gradually before surgery; that it persisted after surgery; that she wore a brace for awhile before surgery; wore a brace fairly constantly after surgery and wore it intermittently at the time I saw her.

507-23 She further declared that in October of 1963, she was again hospitalized in Freedmen's Hospital when she fell downstairs backward, because "my foot gave way."

She was taken to Freedmen's Hospital where she remained for four days. She had cuts in her scalp which were sewed up. She had not been unconscious in the accident. She was generally shaken up.

She said she had had no further injuries, illness, or operations since October, 1963.

At the time of my examination, to repeat, she complained of absence of full use of the right foot and toes and loss of sensation as well. She said she had pain in her back. She said she took an occasional pain pill.

* * * * *

Q. Having taken that history did you do a neurological examination? A. Yes, sir.

* * * * *

507-50 Q. Doctor, did your examination consist of anything else? A. No. That was the extent of the examination referred to which was supplemented as I mentioned by X-rays of the hip joint, knees, and ankles and lumbosacral spine.

* * * * *

Q. Did you form any opinion as a result of your examination and the history the patient gave you, as to her state of health, her state of neurological health, whether she was suffering from any disability?

A. * * * It is my impression that the patient showed the residuals from exploration of the lumbar disk which are usual.

507-51 In other words, slight sensory loss in the first sacral segment, the outside of the foot and little toe described, and absence of the right ankle jerk.

These are attributable to the exploration alone.

I should have stated the back bending was normal in all directions for the age and weight of the patient, in my opinion.

There was no sign of any present disk herniation or of any present nerve pinching process.

There was no sign of any peroneal fall palsy or foot drop in my opinion.

* * * * *

MR. CONNOLLY:

* * * * *

507-52 While the Doctor is doing that I would like to introduce into evidence those documents which I have previously had marked for identification.

I can't introduce the three photographs. They have not been identified yet.

No. 4, which is renewal of the D. C. Operator's License, I would like to offer into evidence.

No. 5, which is the Freedmen's Hospital Record which the Doctor is looking at.

No. 6, Dr. Lee's medical report dated May 29, 1963, which we had identified yesterday.

And No. 7, Dr. Robinson's medical report of May 27, 1953, which we had identified yesterday.

THE COURT: They are now being offered?

MR. CONNOLLY: This isn't Dr. Robinson's. This is Dr. Ammerman's report.

THE COURT: The Court is inquiring if the defendant's Exhibits Nos. 4, 5, 6, and 7 are now being offered in evidence?

MR. CONNOLLY: Yes, sir.

THE COURT: Defendant's Exhibits Nos. 4, 5, 6, and 7, respectively, are received in evidence.

(Defendant's Exhibits Nos. 4, 5, 6, and 7, marked for identification, were received in evidence.)

* * * * *

507-64 BY MR. CONNOLLY:

Q. Did Dr. Ammerman's report indicate whether the surgery which was performed in this case by him removed this lady's difficulty?

A. The description of the course of the patient after surgery mentions continuing complaints, at the same time mentioning continuing findings. There is no flat prediction.

Q. Did she not manifest the same complaints, according to Dr. Ammerman, after surgery as she manifested before surgery? A. I can't be sure about a matter of degree. The last paragraph says: At the time of the patient's most recent visit of April 25, 1963, she continued to complain – which was two and a half years after surgery – she continued to complain of considerable pain in the right hip, right thigh, and the top of the right foot. There was some lumbar tenderness and tenderness to the right of the lumbar area. She still could not dorsi flex and cock up the right foot as well as the left. There continued to be tenderness over the dorsum of the right foot on palpation.

507-65 Q. If the lady's difficulties had been due to a ruptured or herniated intervertebral disk which was removed do you have an opinion, Doctor, based on your experience, based on reasonable medical certainty, whether two and a half years later those complaints should have been resolved and cleared up. A. I can only base that answer on patients who have had truly ruptured disks or truly herniated disks that I treated personally, surgically.

Q. What is that experience? A. That if there is a significant herniation or actual rupture of the disk to account for pain in the back and leg and, of course, everyone knows there are many other reasons for a back pain, but if the back and leg pain is due to a true disk rupture or herniation and if the herniation or disk rupture is removed and the nerve is thereby freed up, the patient is improved significantly to an extent of restoration to approximately 90 percent of normal within a period of time varying from three weeks to three months thereafter.

Everyone who has been operated on has some complaint about the incision or drawing or this and that and that applies to abdominal surgery as well as any other kind, but in general when a patient has a ruptured disk, either truly herniated – I mean herniated or truly ruptured

507-66 and it is taken out and that was the cause of the low back and sciatica, you don't see them again after approximately six weeks post operative check up and usually before that. They are, of course, subject to

attacks of lumbago or back pain thereafter as is anyone else but the major complaint of low back pain and sciatica is relieved.

Q. Is the sensory disturbance you found on your examination compatible with a disk removed at the level that Dr. Ammerman's report and the operative report state? A. Yes, there is loss of sensation persistent after a truly ruptured disk has been removed at the fourth disk level. It is usually on the top of the foot and the top of the toe in the same area where the muscles are weak. But this is not invariable. There is enough variation of the normal pattern so that one could not say flat that that loss of sensation did not correspond with the level of the disk referred to. In the majority of cases it does not.

Q. Doctor, in the course of your examination of Mrs. Buggs did you have occasion to test the function and performance of her foot and ankle on her right side? A. In the fashion and the manner described. There was tenderness on pressure over the arch, she stated. The motion of the foot in walking, standing, standing on the toes and heels was described. The reflex was described. The feel of the skin of the foot was described.

507-67 Q. This is what I want to ask you: Did you find any evidence that this lady was suffering with a persistent weakness of the right foot or ankle? A. Was there any objective evidence of significant physical weakness of the right ankle?

I would say that the variation in the cocking up of the foot on the right, which I described as not being a true foot drop, that variation in cocking up could be considered to be evidence of mild residual weakness of the ankle. Yes, sir.

Q. From what cause? A. From what cause? Based upon this examination alone it could be a number of causes. That variation in cocking up the foot would not bespeak a single cause necessarily.

Q. What are possible causes? A. Of such residual minor weakness in foot cocking up: previous sprain, favoring the extremity, some involvement of the fifth lumbar nerve root, not sufficient to cause a foot

drop but a minor variation of that, fibrosis, meaning scarring of the tendons or ligaments of the ankle or foot, arthritic changes.

Q. Is it explainable in the case of Mrs. Buggs on the basis of the operative surgery she had? A. Could the retraction of the 5th lumbar nerve root in the fashion described result in such residual weakness? Yes, it can.

507-68 Q. How about if a truly herniated or ruptured disk were present at that level? A. Could that relieve its stigma by a minor weakness in dorsi flexion? Yes, it could.

* * * * *

507-69 WILLIAM H. DESKINS

* * * * *

507-85 CROSS EXAMINATION

BY MR. LAWSON:

Q. Mr. Deskins, you said Mrs. Buggs told you she struck her left foot. Is that correct? A. Yes.

507-86 THE COURT: The Court was unable to hear the question.

MR. LAWSON: I asked the witness if Mrs. Buggs told him she struck her left foot.

THE WITNESS: Yes, sir.

BY MR. LAWSON:

Q. No question about that? A. That is what she told me.

Q. Did she tell you she struck it – where did she tell you she struck it? A. Just above her lower shin.

Q. Will you show the jury? Just put your foot out. A. (Indicating.)

Q. On top of her foot. What did you say to her when she told you she had struck her foot? A. I can't remember that.

Q. Do you remember telling her she wasn't hurt? A. No, sir, I don't.

Q. You don't deny it? A. It isn't my general way of doing things. Let's put it that way.

Q. You don't deny –

MR. CONNOLLY: Your Honor, I think the witness wanted to add something.

BY MR. LAWSON:

507-87 Q. Go ahead. A. When a customer comes to me with a complaint of an accident I don't react that way.

Q. How did you react this day, if you remember? A. I don't recall.

Q. Do you know whether or not Mrs. Buggs had talked to some other employee in the store before she got to you? A. I don't know that.

Q. There were other employees in the store. A. Yes, sir.

Q. She didn't ask you as to the location of any goods in the store, did she? A. I couldn't say.

Q. I am not clear where you made the X showing where she claimed to you she hurt her foot. You are saying that this tissue was not on there at the time? A. That's right.

Q. You are sure it was not. A. That's right.

Q. So this platform was empty. A. Yes.

Q. And this platform comes all the way down to the floor. This is the black part? A. No, sir. That is just the black in this picture.

Q. How about on this one?

507-88 MR. CONNOLLY: We are getting awful close. I did the same thing, so I know. I am having trouble hearing each one of you.

BY MR. LAWSON:

Q. Do you know when this platform was removed? A. I beg your pardon?

Q. Do you know when this platform you said she told you she struck her left foot on was removed? A. You mean when the merchandise was removed from it?

Q. Yes, sir. A. I think I was in the process of doing it right then. When something sells down we remove it and replenish it with something else.

Q. You moved this stuff immediately after the accident? A. No, sir. It was empty. It had to be removed before the accident.

Q. I understood you to say you were in the process of moving it at that time. A. In the process of making the change.

Q. At the time of the accident? A. Yes, sir.

Q. How could it be empty, then? A. How could it be empty?

Q. If you were at the time of the accident removing some of the stuff from it, it could not be empty. A. I was in the process of making the change from one to the other.

507-89 Q. So it was not empty. A. Yes, it was empty.

Q. I don't understand you. I understand you to say at the time of this accident you were in the process of moving this stuff from the platform. A. Excuse me. In order to get one item on there, this is all in the process of making the change. First you have to move one and then you move another one on.

Q. And you were doing that at the time of the accident, putting some on and taking some off. A. I had taken it off –

Q. Taken what off? A. I had taken the merchandise from the end fixture. Mrs. Buggs had her accident before I had gotten the other stuff back on.

Q. How did you happen to be doing it at that very moment?

A. The same way I would have happened to be doing it at any other moment.

Q. You, then, saw the accident, didn't you? A. No, sir. I did not.

Q. You were right there, you had just finished emptying the platform at the very moment when she fell. A. No, sir. I wasn't there. I

507-90 was somewhere on the sales floor. I was called away for something.

Q. Then how do you know you had just completed the removal of the commodities on the platform? A. When I say "just" I mean within a reasonable period of time.

Q. What time? A. Fifteen or twenty minutes. Something to that effect.

Q. Did she tell you in which direction she was going? Let me show you this exhibit and ask you to point out the direction she told you she was walking. A. She didn't say she was walking in any direction. She said, "I was stretched up to get this thing and I bumped my ankle."

Q. She was stretched up to get what? A. She didn't specify a particular item. Something on the top shelf.

Q. She didn't say anything about black pepper? A. No, sir.

Q. You don't know whether she had asked another employee for the location of the black pepper? A. No, I don't.

Q. Your testimony is that as she reached up to get something she struck her left foot? A. Yes, sir.

507-91 Q. Point out precisely on this empty platform, if you can, where she told you she struck her left foot. A. In this area here. (Pointing.)

MR. CONNOLLY: May I see it.

THE WITNESS: In this area, when she was reaching for something on the shelf.

MR. CONNOLLY: Can he point that out to the jury. It doesn't do any good for you and I to do it.

MR. LAWSON: Come out to the middle.

(The witness stood before the jury.)

THE WITNESS: She was reaching to this top shelf up here. (Pointing.)

(On the stand:)

BY MR. LAWSON:

Q. Didn't she tell you she had just made a right turn into this aisle? A. No, she did not.

Q. You don't know which way she was going? A. No.

Q. Did you see her fall? A. Did I see her fall?

Q. Yes. A. No, sir.

Q. Where was she and where were you when you first talked with

her. Show me on this picture. A. I couldn't say. She approached me
507-92 wherever I was on the sales floor and took me to the area where she bumped her shin.

Q. Do you recall if you were close to the scene of the accident or a long way from the scene of the accident? A. I couldn't have been very far. The sales floor isn't very large.

Q. How large is it? The length of this room? A. Some larger than this room.

Q. Somewhat larger than this room. A. I will say so, yes, sir.

Q. You don't know where you were when she approached you about this incident? A. No, sir. I do not.

Q. Did she tell you how long before it happened? A. I suppose she just bumped her knee or shin and looked me up immediately.

Q. You don't know much about this at all, do you? A. I know what she told me.

Q. And that is all you know. A. That is all I know.

Q. Did you check the witnesses to this thing? A. There were no witnesses.

Q. How do you know? A. I didn't check for any.

507-93 Q. You don't know, then, do you? A. No.

Q. Isn't it the custom of the managers of your stores and your custom when an incident happens, to ascertain witnesses, if any? A. Yes, if there is apparent reason to believe there is some damage.

Q. And you didn't do that, did you? A. No.

Q. Therefore, you thought there was no damage, didn't you?
A. Right.

Q. You know now there was damage, don't you? A. No, I don't.

Q. You don't know it was not her left foot but her right foot that she struck? A. No, I don't.

MR. CONNOLLY: Just a moment. All we know is the plaintiff testified in this courtroom it was her right foot.

MR. LAWSON: I have a right to ask if he knows.

THE COURT: That question has been asked and answered.

MR. LAWSON: All right.

BY MR. LAWSON:

Q. You said this was around what time? A. In the evening.

Q. Around what time? A. 5:00 o'clock.

507-94 Q. The store is pretty full around that time, isn't it? A. Some stores. That one wasn't.

Q. Yours was not full around 5:00? A. No.

Q. What day of the week was this? A. I don't remember.

Q. You are sure it was 5:00 and not around 1:30? A. According to the report.

Q. What report? A. That I made at that time, it was 5:00 o'clock.

Q. Have you got a copy of that report? A. No.

Q. What did you do with it? A. It was filed with the company I work for.

Q. Could you bring it tomorrow morning. A. I don't know.

MR. CONNOLLY: I've got a report in my file.

MR. LAWSON: May I see it?

MR. CONNOLLY: Yes. (Handing.)

BY MR. LAWSON:

Q. The notation on the back here is that these photographs were made August 28, 1958. That is correct, isn't it? A. I don't know when the photographs were made.

507-95 MR. CONNOLLY: They were, if you want a stipulation to that.

MR. LAWSON: Yes.

MR. CONNOLLY: That is the Adams Studio stamp.

MR. LAWSON: I don't doubt it.

BY MR. LAWSON:

Q. It is true, then, we all admit, these pictures were made roughly two months after the accident. When these pictures were made two months after the accident can you tell the difference between what is shown in this photograph and what existed on the 11th of June, other than

what you have already testified? A. I don't quite follow your question.

Q. What is different in this photograph? A. The merchandise that is on the shelf.

Q. All around? A. Yes.

Q. This has been changed about two months after. A. No, sir. It's been changed many times.

Q. I know, but in this photograph, the commodities shown in this photograph were not where they are now on June 11. A. Not likely, no.

Q. Would you show me gondola 15 in this picture, if you can? Is this detachable? A. Yes, it is. But it isn't something you can roll

507-96 away. It has to be – it is bolted down.

Q. Bolted to the floor. A. Bolted to this big flat piece here. (Indicating.)

MR. CONNOLLY: It is bolted to the end piece of the gondola, isn't it?

THE WITNESS: Yes.

BY MR. LAWSON:

Q. Do you remember when you made your report to the Safeway? A. Immediately after the accident.

Q. What do you mean by immediately? A. Just as soon as I could get the report and fill it in.

Q. You mean the same day? A. Yes, sir.

Q. Could you say approximately how many people were in the store at the time of this accident? A. No, I couldn't.

Q. No idea? A. I could guess.

Q. Guess.

MR. CONNOLLY: No. I don't want him to guess and neither does the Court, if Your Honor please.

507-97 THE COURT: An objection has been made.

BY MR. LAWSON:

Q. Can you approximate?

MR. CONNOLLY: Would Your Honor tell the witness what is meant

by an estimate. It has to be based on some observation and not what is usual or customary or what he thinks may have been there.

MR. LAWSON: I didn't want to go through all that to save time, but I will if you want me to.

BY MR. LAWSON:

Q. You were the manager of this store and it seems to me you would be able to estimate or approximate how many people were in this store on this day.

MR. CONNOLLY: You mean on this day?

MR. LAWSON: Yes, June 11, 1958.

MR. CONNOLLY: Do the best you can.

THE WITNESS: I would say a dozen maybe.

BY MR. LAWSON:

Q. How many employees were there on that day? A. Was this a Friday?

Q. I don't remember, frankly.

MR. CONNOLLY: Wednesday. Do you understand his question? Not how many people were in the store at the time but how many were in the store all day.

507-98 MR. LAWSON: No, I want to know how many people approximately were in the store at the time of the accident.

MR. CONNOLLY: You said all day and then he answered twelve. I was going to say it was a pretty slow day.

THE COURT: Do you understand the question?

THE WITNESS: Yes, sir. I think so, but I can't answer it. I can make a guess. That is all I can do.

BY MR. LAWSON:

Q. How many employees were in the store that day? A. That's all I could do, would be –

Q. Don't you know how many employees? A. At a particular time four years ago? No, sir, I don't.

Q. How many do you have now? A. Now?

Q. Yes. A. In the store?

Q. Yes.

MR. CONNOLLY: He is in a different store now.

MR. LAWSON: I know. I am trying to refresh his recollection.

BY MR. LAWSON:

Q. How many employees do you have in the store today? A. Today?

Q. Yes. Approximately. A. I can figure it out. (Pause.) Ten approximately.

507-99 Q. With that figure in mind can you estimate how many you had in the store in June of 1958, more or less? A. It would be less.

Q. How many less? A. Probably half as many.

Q. You are not bound by this but you had approximately five employees and do I understand now in addition to the five employees there were ten, twelve other people; is that fair? A. Yes.

Q. So that you had fifteen or so people in the store and you made no effort to ascertain whether any of them saw this accident? A. No, sir.

MR. LAWSON: That's all.

THE COURT: Redirect?

MR. CONNOLLY: I am not going to have anything.

* * * * *

507-100 MR. CONNOLLY: That is all the evidence the defendant has to offer. I do wish to offer the Official Transcript of the testimony of Mrs. Buggs given on January 23 and 27, 1964 in this court. I also wish to offer that portion of the plaintiff's deposition of June 12, 1960, which I read and confronted her with on the witness stand, offer it in evidence

507-101 to prove that she did in fact say the things that are reported in the deposition.

With that the defendant rests.

* * * * *

516 Friday, March 13, 1964

* * * * *

517 INSTRUCTIONS TO THE JURY

THE COURT: Ladies and gentlemen of the jury, the case upon which you are now sitting as jurors is the case of Maggie L. Buggs and Charles W. Buggs, plaintiffs, against Safeway Stores, defendant.

In these instructions I shall refer to the plaintiffs as the plaintiffs and to the defendant as the defendant, or I may at times distinguish between the respective plaintiffs by calling them the female plaintiff and the male plaintiff, respectively, or by using their proper names, and at times I may refer to the defendant as Safeway.

This is an action for damages for personal injuries and expenses alleged to have been sustained by the female plaintiff.

The said female plaintiff alleges that on June 11, 1958, while shopping in the defendant's grocery store at Eighteenth and Hamlin Street, her right ankle struck a platform which she alleges was negligently placed in the aisle of the store by the defendant, and that as a consequence she fell over said platform and was injured.

She further alleges that a series of injuries which she alleges she suffered after that date are proximately the result of that fall in the defendant's store on June 11, 1958, and she seeks to recover damages therefor.

518 The male plaintiff claims damages for the alleged loss of his wife's consortium. Consortium will be explained to you in the instructions. He alleges that his loss resulted from the same injury which his wife, the female plaintiff, claims she suffered.

Defendant Safeway admits operating the store on June 11, 1958, but alleges that if the female plaintiff suffered any injuries on that date, or later, those injuries were not the result of any negligence of the Safeway Store but resulted from other causes.

The defendant denies that it was negligent in the maintenance of its store on June 11, 1958, and claims that if the female plaintiff was injured

on that date in said store, it was caused by her own negligence in failing to exercise reasonable care to watch where she was going. That is, the defendant alleges that if the female plaintiff sustained any injury in its store on June 11, 1958, said injury was caused by the negligence or contributory negligence of the female plaintiff.

Defendant further alleges that any injuries which the female plaintiff may have sustained after that date, June 11, 1958, were not the proximate result of any accident which may have occurred in its store, but

519 were the result of other causes. That is, defendant claims that if the female plaintiff did suffer personal injuries after June 11, 1958, they were not proximately related to any conduct of the Safeway Stores in June of 1958, but were the result of the negligence or contributory negligence of the female plaintiff.

The statement which the Court has just made to you, ladies and gentlemen of the jury, does not, of course, purport to constitute a statement of the facts developed by the testimony. It is rather a mere statement or outline of the allegations, the claims of the plaintiffs and the defendant, respectively, as to what they respectively contend the facts to be.

You have heard the evidence and the arguments of counsel, attorneys for the plaintiffs and for the defendant, and it now becomes my duty as Judge to instruct you as to the principles and rules of law governing the case. It is your duty as jurors to follow the Court's instructions as to the law and to take the law from the Court. On the other hand, ladies and gentlemen of the jury, you are the sole judges of the issues of fact and you must determine the facts for yourselves solely upon the evidence presented at this trial.

The burden of proof is on the plaintiffs to establish every aspect of their case by what we call a fair preponderance of the evidence. The

520 term preponderance of the evidence means such evidence as when weighed with that opposed to it has the more convincing force.

A party has succeeded in carrying his or her burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes you,

the jury, to believe that on that issue the probability of truth favors that party.

As jurors you are the sole judges of the credibility of the witnesses; that is, their worthiness of belief; and in determining the credibility of the witnesses you may take into consideration the attitude and the demeanor of the witnesses on the witness stand, their ability to recall the facts and circumstances concerning which they have testified, their frankness or lack of it, their bias or prejudice, if such may be manifest, and their interest in the outcome of this case, if any, and you are to give their testimony such weight as you the jury think under all the circumstances it is entitled to.

You will try this case solely on the testimony of all the witnesses presented in open court on the witness stand and all of the other evidence introduced in the case. It is your duty and responsibility to resolve any conflicts in the evidence. You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction

521 in your mind, if it does not, as against the declaration of a lesser number which appeals to your mind with more convincing force, if it does so appeal.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses but in the relative convincing force of their evidence.

In this case some of the evidence has been introduced by way of stipulation. You are instructed that a matter stipulated to by counsel on both sides is to be regarded by you just as though it had been testified to by a witness under oath.

If you believe that any witness wilfully has testified falsely as to any material matter as to which the witness could not in your judgment reasonably have been mistaken you are then at liberty to disregard all

the testimony of that witness or to disregard any part of the testimony of that witness which you may see fit to disregard.

522 Now, the Court has instructed you on the law generally applicable to a civil action. I shall now instruct you on the law specifically applicable to this particular case upon which you are sitting as jurors.

In this action the female plaintiff alleges that the defendant is liable for the damages resulting from injuries alleged to have been suffered by her. The Court will now instruct you on the law relating to the elements essential to both plaintiffs' cases; that is, matters of negligence, proximate cause, and damages, together with the law concerning those elements which the defendant asserts by way of defense, such as the allegations of contributory negligence, proximate cause, and all other matters necessary for your deliberation of the case and the determination of it.

In this case plaintiff alleges that she was injured as the proximate result of the defendant's negligence. The defendant denies it was negligent in any respect and further denies it was in any way responsible for any injury or damage which plaintiff may have sustained.

Concerning negligence you are instructed as follows. Negligence may be defined to be the failure or omission to do something which under the circumstances a reasonable and prudent person would do or the doing of something which under like circumstances a reasonable and

523 prudent person would not do. It is the absence of the ordinary care which is required according to the circumstances.

By ordinary care is meant such an amount or degree of care as a prudent and reasonable person, having a proper regard for one's own safety and the safety of others, would exercise under existing circumstances and conditions, and where known risks enhance the danger the degree of care is correspondingly increased.

You are instructed that the defense of contributory negligence is asserted by the defendant with respect to each injury sustained by the plaintiff subsequent to June 11, 1958. If you find that the plaintiff suffered from recurring weakness of the ankle or numbness of the foot, you

are instructed that the law imposes upon her a burden to exercise a degree of caution, proportionate to the hazard of falling.

You are instructed that no presumption of negligence whatsoever arises from the mere happening of the accident involved herein, or the sustaining of any damages which plaintiff may establish to have been sustained.

The burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence that the defendant was guilty of negligence and that such negligence was the proximate cause of the accident and of any damages which you may find the plaintiff has sustained.

524 By proximate cause, as that term is used in these instructions, is meant that cause which in natural and continuous sequence, unbroken by any efficient intervening cause produces a damage to the complaining party and without which the result would not have occurred.

It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury or injuries alleged. It may operate directly or by putting intervening agencies in motion. In connection with, and as a part of the Court's instructions on proximate cause, you are instructed that if the female plaintiff is entitled to recover any damages from the defendant, the amount of such damages must be limited to such injuries as have been shown by a preponderance of the evidence to have proximately resulted from the accident in the defendant's store on June 11, 1958.

In other words, you should not award the female plaintiff damages for any injuries which you find she has suffered after June 11, 1958, unless it has been shown by a preponderance of the evidence that those later injuries were proximately caused or proximately resulted from the accident on June 11, 1958.

You are instructed that as a matter of law the owner or occupier of a building has the duty toward any person whom it permits or allows

525 to come upon its premises for any lawful purpose, to maintain its premises in a reasonably safe condition.

Such a person is a business visitor who is considered to be an invitee of the owner or occupier.

The owner or occupier of a building who so permits or allows another to come upon its premises for any lawful purpose is liable in damages to such person as an invitee if such person is free from contributory negligence, as I shall define that term for you, for injuries occasioned by the unsafe condition of such premises, if such condition were known or in the exercise of reasonable care should have been known to the owner or occupier, and if such unsafe condition was the proximate cause of injury to such person as said term proximate cause has been defined for you in these instructions.

The issues to be determined by you in this case are as follows:

First, was the defendant negligent on June 11, 1958? If you answer that question in the negative; that is, if you find that the defendant was not negligent, then you will return a verdict in favor of the defendant. If you answer that question in the affirmative; that is, if you find that the defendant was negligent, then you have a second issue to decide, namely, was that negligence the proximate cause of any injury to the female plaintiff.

526 If you answer that question in the negative, that is, if you find the defendant was negligent but that such negligence did not proximately cause the injury to the female plaintiff of which she complains, then neither plaintiff is entitled to recover, husband or wife.

If you answer in the affirmative, that is, if you find that the defendant was negligent, and that that negligence did proximately cause injury to the female plaintiff, then you must determine another issue, namely, whether the female plaintiff was guilty of contributory negligence, at that time.

If you find that the female plaintiff was guilty of contributory negligence while shopping in the defendant's store on June 11, 1958, then neither plaintiff is entitled to recover. In that event your verdict should be for the defendant.

If you find that there was negligence on the part of the defendant which proximately caused the female plaintiff to suffer injury on June 11, 1958, and that there was no contributory negligence on the female plaintiff's part, then the female plaintiff is entitled to recover from the defendant for any damages you find she has suffered as a proximate result of the negligence of the defendant on that date, June 11, 1958.

527 In the event you find the defendant liable to the female plaintiff you should then fix the amount of damages to which you find her to be entitled.

You should then decide what loss of his wife's services, if any, the male plaintiff, the husband, has proved by a preponderance of the evidence; whether he has suffered as the proximate result of injuries as you find have been sustained by his wife because of negligence on the part of the defendant. If you do so find, fix the amount of damages, if any, to which you find him to be entitled.

As indicated in this instruction you should first determine the question of liability. The law does not permit you to guess or speculate as to the cause of the alleged accident in question or the proximate cause, if any, thereof.

If the evidence is equally balanced on those issues, namely, negligence, contributory negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then that party has failed to fulfill the burden of proof and in that event your finding must be against that party on that issue.

As you have already been told the defendant denies any negligence on its part and alleges that the female plaintiff was guilty of contributory negligence and that the proximate cause of any injury and the accident itself was the female plaintiff's own negligence or contributory negligence.

528 I have previously stated that I would instruct you on contributory negligence and I shall now do so.

The definition of contributory negligence is the same as the definition of negligence as I have already given you that definition, except that contributory negligence is negligence on the part of the plaintiff rather than on the part of the defendant, as you have already been instructed.

If you find that the defendant was not guilty of negligence your verdict will be for the defendant and in that event you will not be called upon to consider whether the female plaintiff was negligent. It is only in the event you find the defendant guilty of negligence that you will consider whether the female plaintiff was also guilty of contributory negligence.

If you find from a preponderance of the evidence and under the Court's instructions that the defendant was at the time and place in question guilty of negligence as charged by plaintiff, yet if you further find from a preponderance of the evidence that the female plaintiff was also negligent, and that her negligence, if any, was the proximate cause of the accident resulting in injury, or that her negligence proximately contributed to cause the accident, causing injury, then in that event the female plaintiff would have been contributorily negligent.

529 Accordingly, you are instructed if the defendant has not established such defense of contributory negligence of the female plaintiff by a preponderance of the evidence, and if you have found that the plaintiff has established negligence on the part of the defendant by a preponderance of the evidence, then your finding should be for the female plaintiff on the issue of contributory negligence.

However, if the defendant has established said defense of contributory negligence of the female plaintiff by a preponderance of the evidence and if you find said contributory negligence was the proximate cause of the accident on June 11, 1958, or that her contributory negligence proximately contributed to cause the accident on that date, then your finding should be in favor of the defendant on the issue of contributory negligence.

In connection with the defense of contributory negligence, you are instructed that the burden is on the defendant to prove contributory negligence on the part of the female plaintiff by a preponderance of the evidence.

You are instructed that if the evidence on the issue of contributory negligence by the female plaintiff preponderates in favor of the defendant, then and in that event contributory negligence on the part of the female plaintiff has been established.

530 If the evidence is equally balanced or preponderates in favor of the female plaintiff on the issue of contributory negligence then you are instructed that said contributory negligence on the part of the female plaintiff has not been established.

If you do find that the female plaintiff was contributorily negligent you are instructed that her contributory negligence would bar recovery by both plaintiffs.

If it should appear to you from the evidence in this case that the conduct of the female plaintiff in this case amounted to contributory negligence, and, if you further find that such contributory negligence was the proximate cause of the accident or proximately contributed to cause the accident on June 11, 1958, then in that event such conduct on the part of the plaintiff would constitute a bar to recovery by both plaintiffs and in that event your verdict should be for the defendant.

It is for you the jury to determine the issues of negligence and contributory negligence from all the evidence and under the Court's instructions as to the law.

The law forbids you to attempt to classify negligence in degrees, or grades or classes or compare one instance of negligence with another and judge which is more deserving of reproof or excuse.

531 If you find there was negligent conduct on the part of both the plaintiff and the defendant you are not to attempt to determine which is guilty of the greater negligence with a view of delivering a verdict in favor of or to favor in any way the party whose conduct was less reprehensible.

If you find that any party to this action was negligent or that both parties were negligent, you will follow the Court's instructions in determining whether or not liability should attach and do so without regard to how you might grade or compare the negligence involved, if permitted to do so.

I have previously stated the issues of negligence and contributory negligence are for you the jury to determine from the evidence.

If you conclude from all the evidence in this case and under these instructions that the female plaintiff is entitled to recover damages from

the defendant, then the measure of her recovery would be such a sum as would fully compensate her for such damages as you find she has sustained and which are shown by the evidence to be the natural and proximate consequence of the negligence of the defendant.

In ascertaining what damages, if any, the female plaintiff has sustained, you may take into consideration the character of her injuries,

532 whether or not any of them are of a permanent nature, and if so, to what extent the same may be permanent, and such pain or suffering, if any, which you may find by a preponderance of the evidence the female plaintiff Maggie Buggs was or may in the future be thereby subjected.

As to the male plaintiff, Charles W. Buggs, you may consider the loss of consortium, if any, incurred by him as the proximate result of the negligence of the defendant, if you have found the defendant to have been negligent and have found the female plaintiff's injuries, if any, were proximately caused by such negligence.

The Court will now instruct you on the subject of consortium.

As just stated, the husband, the male plaintiff, Charles W. Buggs, is seeking damages for loss of consortium, which he alleges he suffered as a result of his wife's alleged injuries. The term consortium includes within its meaning not only material services of the wife to the husband, but also the wife's comfort, fellowship and affection. The husband is entitled to the wife's society and companionship.

If you find in this case that the wife sustained a personal injury which had an adverse effect on the husband's rights in this respect the husband may recover damages from the defendant if you find the defend-

533 ant was negligent and that the defendant's negligence proximately caused the personal injuries suffered by the wife.

In determining the amount of damages, if any, to which the husband plaintiff is entitled you may and should consider the character and condition of the home wherein the Buggs lived and the services, if any, performed by Mrs. Buggs in the management of that household.

Concerning the claim of the husband for loss of his wife's consortium you are instructed that services rendered by the wife may be and often are

of such character no witness can say what they are worth. Often they have no market value equivalent. Hence it is not necessary that there be direct or express testimony as to the value of the wife's services to entitle the husband to recover for their loss, if you have found such loss to have occurred. The relationship of the wife sustained to her husband is in each case a special and peculiar one and the actual facts of the case at hand must guide you in estimating an amount fairly to reasonably compensate the husband for any loss of the wife's comfort, fellowship, aid and society that you find he may have sustained as the proximate result of the negligence of the defendant, if you have found the defendant to have been negligent and if you have found the defendant's negligence proximately caused the personal injury of the female plaintiff.

534 In other words, before you can consider awarding the husband plaintiff damages you must first have determined that the defendant is liable to the female plaintiff, if you do so determine.

You are instructed that if you find for a plaintiff in this case, then the amount of your verdict must be based upon the evidence as to that plaintiff's injuries and losses. If your verdict is for a plaintiff you are not to award speculative damages, that is, compensation which although possible is remote, conjectural or speculative.

In other words, you are to base your verdict as to damages, if you reach such a verdict, not upon conjecture or speculation, but only as a preponderance of the evidence shows the damages that actually resulted to that plaintiff from the matters complained of.

Certain witnesses have testified in the trial of this case as expert medical and surgical witnesses. You are instructed that a person who by education, study, and experience has become an expert in any profession or calling and who is presented as a witness, may give his opinion as to any matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion.

535 Give it the weight to which you deem it entitled, whether that be great or slight and you may reject it if in your judgment the reasons

given for it you consider to be unsound. And you are further instructed if any conflict in the expert testimony exists, it is your duty to reconcile the testimony if you can, but if you cannot do so, then you have a right to believe the witness whom you deem most worthy of credit and disbelieve the witness whom you consider less worthy of credit, and in weighing the testimony of the expert witnesses, as all other testimony, it is proper for you to take into consideration all the surrounding circumstances of the witnesses, their interest in the result of the action, if any, and their opportunity of knowing the truth of the matter about which they testified as experts, their qualifications, their ability, and their willingness to expound fairly in reference to the subject matter upon which they are called to testify as experts.

At times during the trial the Court has been called upon to make rulings on certain legal matters; that is, on questions involving law. Rulings on questions of law are the concern of the Court solely. Your concern is solely with questions of fact and with the application of the Court's instructions to the testimony and the other evidence in the case, as those instructions relate to your determinations of fact.

536 Your verdict must not be influenced by decisions on matters of law made by the Court during the trial, except as those decisions are reflected in the Court's instructions to the jury.

Throughout the trial the Court has made rulings on the question as to whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings by the Court and you are not to draw any inferences from them. Whether evidence offered is admissible is purely a question of law for the Court's determination.

In admitting evidence to which objection is made the Court does not determine what weight should be given to such evidence. A ruling by the Court permitting testimony to be given or other evidence to be introduced is not to be considered by you, the jury, as any indication as to what weight such testimony or other evidence may or may not have. What weight is to be given to evidence is strictly a matter for you, the jury, to determine for

yourselves. Nor does the Court pass upon the credibility of any witness who testified. A ruling by the Court permitting a witness to testify or to give evidence is not to be considered by you, the jury, as any indication as to what the credibility of that witness may or may not be. Credibility of a witness is likewise strictly a matter for you, the jury, to determine for yourselves.

537 On the other hand, as to any offer of evidence rejected by the Court you, of course, must not consider such evidence, and as to any question to which an objection was sustained you must not conjecture or guess as to what the answer might have been or as to the reason for the objection or for the ruling of the Court.

As I have already instructed you, ladies and gentlemen of the jury, you are to determine the facts for yourselves solely upon the evidence presented at the trial.

In this connection you are instructed that statements or arguments of counsel – the attorneys for plaintiffs and the defendant; statements or arguments by the lawyers – are not evidence and are not to be taken or considered as evidence. Arguments by lawyers are made to assist you in analyzing, and construing, and appraising, and evaluating the evidence, and are to be so considered and so considered only by you. Arguments of counsel have an important place in the case and should be listened to carefully by you and considered by you, the jury, but not as evidence and only for the purpose indicated by the Court.

Every case is to be determined without bias, prejudice, or sympathy for or against either side and solely upon the testimony of the witnesses under oath, the evidence, and the Court's instructions as to the law.

538 You have now heard the Court's instructions. If in all these instructions from beginning to end any rule, direction or idea be stated in varying ways, that is, in differing ways, no emphasis thereon is intended by me and none must be inferred by you.

For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others. But you are to consider all of the instructions as a whole and to regard each in the light of all the others.

Now, ladies and gentlemen of the jury, I want you to take this matter and consider it deliberately in the light of the instructions which I have given you, using the same ordinary common sense and ordinary intelligence that you would employ in determining any other important matters that you have occasion to decide in the course of your every day life.

In reaching your verdict you should first consider the verdict between the female plaintiff, Maggie L. Buggs, and the defendant Safeway. Your verdict may be either for the female plaintiff or for the defendant. In the event your verdict is for the female plaintiff, you shall then state the amount of damages to which you have found she is entitled. If you
539 have found for the female plaintiff you should then consider the verdict between the male plaintiff, Charles W. Buggs, and the defendant. Your verdict between them may be for the male plaintiff or it may be for the defendant.

Again, if you have found for the male plaintiff you will then state the amount of damages to which you have found him to be entitled. If you have not found for the female plaintiff against the defendant, then you are not to find for the male plaintiff.

For the purpose of certainty, in order that there may be no confusion or misunderstanding as to possible verdicts in this case, the Court will ask you to listen carefully to this instruction and bear it in mind.

You are to return two verdicts in this case. The first verdict will be in the case of the female plaintiff, Maggie L. Buggs, against the defendant Safeway. Your verdict in that case may be either for the plaintiff or for the defendant. If your verdict is for the plaintiff, Mrs. Buggs, you will state the amount of your verdict. If your verdict is for the defendant Safeway, you will simply state that your verdict is for the defendant.

Your second verdict will be in the case of the male plaintiff, the husband, Charles W. Buggs, against the defendant Safeway. In the second case between the male plaintiff Charles W. Buggs, the husband, and the
540 defendant Safeway, your verdict may be either for the male plaintiff or for the defendant.

You will remember that you can only return a verdict for the husband, the male plaintiff, if you have already returned a verdict for the wife, the female plaintiff. If your verdict is for the male plaintiff you will state the amount of damages to which you find him entitled. If your verdict in the case of the male plaintiff against the defendant is for the defendant you will simply state your verdict is for the defendant.

As you, of course, know, your verdict must be by unanimous vote.

Before commencing your deliberations you will select one of your number foreman. Whenever you shall have arrived at a verdict notify the Marshal, whereupon you will be escorted back to the court room to return your verdict.

You will please remain in your seats in order that the Court may afford counsel on both sides if they desire to do so, an opportunity to approach the bench.

Do counsel desire to approach the bench?

(AT THE BENCH:)

MR. LAWSON: I have nothing. I am satisfied.

MR. CONNOLLY: I have a number of things, Your Honor.

One, I am going to ask Your Honor to charge in the manner and form of the requested instructions which Your Honor denied.

541 THE COURT: That is a matter of form and the Court already marked them up. The ruling of the Court has already been indicated.

MR. CONNOLLY: I ask Your Honor to charge in accordance with the substance of those charges.

THE COURT: That is incorporated in the first ruling. That is denied.

MR. CONNOLLY: Your Honor, going specifically to the charge Your Honor gave, I object to the charge as a whole as applied to this case because I believe it is too general and of insufficient specificity to the issues of this case.

I think this case, as I think most negligence cases require charges dealing with negligence and contributory negligence and proximate cause,

within the terms of the issues of that case, and, therefore, I object to a charge which does not take up the factual issues in the case.

THE COURT: That objection is noted and the objection is overruled. If it is a request for additional instructions that request is denied.

MR. CONNOLLY: I object to Your Honor's charge insofar as it stated contentions of the parties. I do not think Your Honor's charge made it clear and indeed I think it made it abundantly clear to the contrary.

542 It did not make it clear that the defense of contributory negligence was an alternative defense. Basically, the defendant denied negligence. I think Your Honor's charge made it appear the defendant has undertaken to defend the case by charging the plaintiff with contributory negligence. We assert that only if Your Honor rules against us –

THE COURT: What is your motion?

MR. CONNOLLY: I am now objecting to the charge.

THE COURT: You are objecting to the charge?

MR. CONNOLLY: Yes.

THE COURT: That objection is noted and the objection is overruled.

MR. CONNOLLY: The same contention was made with respect to subsequent accidents. Your Honor's statement of the contention of the parties made it appear that the defense to the claim for damages growing out of subsequent accidents rested upon our contention that with respect to each such accident the plaintiff was contributorily negligent. Your Honor did not make it clear that that was an alternative defense. The principal defense we make is that there is no proof of proximate causation.

THE COURT: The request is noted and the request is denied. The objection is noted and the objection is overruled.

543 MR. CONNOLLY: I think Your Honor's instructions on credibility are insufficient. Your Honor gave the usual charge of falsus in uno, in which it is stated a wilful misstatement may entitle the jury to disregard the testimony of the witness.

I think careless, negligent regard for an oath also gives the jury that right, and the jury should be so instructed.

THE COURT: Is that an objection?

MR. CONNOLLY: And request for instruction.

THE COURT: The request for instruction is denied and the objection to the instruction is overruled.

MR. CONNOLLY: I want to come to the question of negligence. I object to Your Honor's charge on negligence. I do not think it is specific enough and not given in the factual framework of this case. I ask Your Honor specifically with respect to that to charge the jury what is negligence in the factual framework of this case. I think that is already covered.

THE COURT: The request is noted and the request is denied.

MR. CONNOLLY: I object to Your Honor's instruction on the defendant's duty toward an invitee because it is not given in relation to the conduct expected of a patron.

544 Your Honor did not state in your instruction as to an invitee that the duty is in relation to the conduct reasonably to be expected by persons exercising due care for their own safety.

THE COURT: Is that an objection?

MR. CONNOLLY: Objection and request. Objection as not covered and request that you instruct more completely.

THE COURT: The objection to the instruction is noted and the objection is overruled. The request is noted and denied.

MR. CONNOLLY: Nowhere in Your Honor's charge did you say that a patron in a store has a duty to keep a lookout for their own safety and to be aware of their own welfare and keep an adequate lookout.

THE COURT: The Court feels that is covered in the general instructions. That is noted and overruled.

How many more have you got?

MR. CONNOLLY: About five more.

THE COURT: Get them out of your system. Let's move on. We have this jury.

MR. CONNOLLY: I am obligated to do this. I hope you understand this.

THE COURT: I have been trying cases quite awhile. This is a more elaborate set of objections and requests than I find in the ordinary
545 case. We are keeping this jury over the noon period. I give you full opportunity to make your record, but make it.

MR. CONNOLLY: I object to Your Honor permitting this jury to consider evidence of permanent damages. I object to –

THE COURT: Is that an objection or are you going to argue it?

MR. CONNOLLY: I am not going to argue it. I am not going to argue any of these things. It is an objection.

THE COURT: What is the objection?

MR. CONNOLLY: Your Honor permitting the jury to consider damages for permanent injuries.

THE COURT: The objection is noted and the objection is overruled.

MR. CONNOLLY: I object to Your Honor permitting the jury to award damages for the consequences of any conduct beginning – for any damages, disability or injury beginning in September 1958. In other words, I think Your Honor should have restricted the jury to consider the question of damages only with relationship to whatever consequences came out of June 11, 1958.

THE COURT: The objection is noted and the objection is overruled. What next?

MR. CONNOLLY: That's it.

THE COURT: All right.

* * * * *

**DEFENDANT'S EXHIBIT NO. 6**

May 29, 1963

Mr. Richard Atkinson, Esq.

Re: Mrs. Maggie Buggs
4103 18th Pl., N.E.

Dear Sir:

The above named was seen at home as an emergency on February 1, 1959, lying on a couch in her living-room, in excruciating pain. History as related by patient is that she had sustained an injury to her right ankle and foot in June 1958 and since that time, had experienced great difficulty, including pain, swelling and instability of the right ankle and for which she was under the medical care of Dr. Henry Robinson, of 6th & R Streets, N.W.

Mrs. Buggs was proceeding from the living-room into the dining-room when suddenly her right ankle and foot gave way as she approached a chair, the right foot striking one of the chair legs and in an attempt to right herself, she lurched forward and suddenly experienced excruciating pain in the lower back. This pain was so severe that patient had to be carried to a couch by her husband. She remained unable to move until seen by me at which time she felt quite nauseated as a result of the continuing pain in the lower back.

Physical examination revealed a middle aged, moderately obese female lying on the couch unable to move the lower extremities; the vital signs . . ie . . Temp., Pulse, and Resp. were within normal limits. Blood Pressure - 140/90, the head, eyes, ears, nose and throat were entirely negative. Slight distention of the cervical veins were noted, the chest was equal and symmetrical, the breast were normal and devoid of both masses and secretion. The heart mechanism was normal, the lungs were clear to percussion and auscultation. The abdomen was slightly ovoid and there was tenderness to palpation in both lower quadrants and this tenderness was referred to the lower back. The genitaliae was normal as was the rectal examination. The upper extremities showed no departure

Defendant's Exhibit No. 6 (Cont'd)

from the normal, however, both lower extremities could not be moved due to pain-limitation referred to the lumbar area of the spine. Point tenderness was noted over the 3rd thru the 4th lumbar vertebrae with associated marked muscle spasm. Attempts at straight-leg raising test were futile because of the marked pain and muscle spasm associated with such attempts. Hyperasthesia was noted over the right lower extremity, both laterally and posteriorly. There was moderate swelling and point tenderness over the lateral malleolus of the right lower extremity and moderate discomfort on deep palpation. Neurological examination was entirely negative except for the hyperasthesia noted over the lateral and posterior aspects of the right hip, thigh, and leg.

It was felt by me that Mrs. Buggs had sustained what appeared to be a slipped disc and she was treated conservatively with opiates, analgesics and intramuscular robaxin as an emergency. As she was already under the care of an orthopedic surgeon, Dr. Henry Robinson, and already had an appointment with him within the next 24 hours, it was felt that he would more fully evaluate her, and he was called at that time and appraised of the complete situation. Mrs. Buggs has not been seen since, professionally.

Attached is an itemized statement of the cost of medical services rendered the above named.

Yours truly,

Robert E. Lee, M.D.

REL/ag

**DEFENDANT'S EXHIBIT NO. 7**

HARVEY H. AMMERMAN, M.D.
Potomac Plaza Terraces
730-24th Street, N.W.
Washington 7, D.C.

Neurological Surgery

FEderal 7-6200

May 27, 1963

Mr. Richard R. Atkinson
626 Third Street, N. W.,
Washington, D. C.

Re: Buggs, Maggie L.

Dear Mr. Atkinson:

The following is a summary of my care in the case of the above patient which is being forwarded to you at the request of the patient and her husband.

The patient was initially examined on May 4, 1960. The history obtained at time time revealed that the patient was injured on June 10, 1958 when, while in a Safeway Store, she caught her foot on a projection and was thrown forward. As a result of this she injured her right ankle and right foot. This was followed by severe pain in the top of the right foot together with numbness in the right great toe. As the patient's pain and numbness persisted she came under the care of Dr. Henry Robinson, the orthopedic surgeon, who treated her. In the beginning of 1959 the patient's right foot gave way and as a result she twisted her back and this was followed by the persistence of low back pain together with radiation into the right lower extremity and foot. The patient also developed a right foot drop following this difficulty.

Examination revealed a 52-year-old woman who gave the previously stated history. The straight leg raising test was positive on the right at 80° and negative on the left. The knee jerks and ankle jerks were plus 2 bilaterally. There was weakness of dorsi flexion of the right foot. There was marked tenderness over the lateral aspect of the right foot and hypesthesia over the medial aspect of the right leg and foot. There was marked tenderness over the 5th lumbar vertebra and to the right of the 5th lumbar vertebra.

As the patient's pain became intractable she was hospitalized and on September 16, 1960 she had a pantopaque myelogram at Freedmen's Hospital which revealed a herniated lumbar disc. She was operated on September 20, 1960 at which time the extruded disc fragment at L4 on the right was removed.

Defendant's Exhibit No. 7 (Cont'd)

Following surgery the patient's pain was greatly improved, although she continued to have some residual pain. However, her foot drop remained unchanged.

The patient continued to be followed at regular intervals after her discharge from the hospital but she continued to walk with a limp because of the persistence of the right foot drop. It became necessary in June, 1961 to prescribe a foot brace so that she could carry her right foot in a neutral position. By the time of her visit on July 13, 1961 the patient was able to walk with the foot brace in a more satisfactory manner. Because of increased pain in her right hip and low back she was given a prescription for Norflex. The patient continued to be followed at regular intervals in this office and by the visit of May 15, 1962 there remained significant weakness of dorsi flexion of the right foot but the patient could now hold her foot in a neutral position without difficulty.

At the time of her visit of September 10, 1962 she walked with a limp favoring her right lower extremity and she continued to be disturbed by numbness involving the right foot, particularly the middle toe and the toes lateral to it. There was still some tenderness over the lateral aspect of the upper part of the dorsum of the right foot. Sensory examination revealed a diffuse hypesthesia over the right foot and over the lateral aspect of the right leg.

At the time of the patient's most recent visit of April 25, 1963 she continued to complain of considerable pain in her right hip, right thigh and the dorsum of the right foot. There was some lumbar tenderness and tenderness to the right of the lumbar area. She still could not dorsi flex the right foot as well as the left. There continued to be tenderness over the dorsum of the right foot on palpation.

Very truly yours,

/s/ Harvey H. Ammerman, M.D.

HHA/mcl

[Filed March 13, 1964]

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

You are instructed that if you find that the defendant was negligent under the instructions I have given you and that the female plaintiff was not guilty of contributory negligence, you should award damages, in accordance with the rules which I will hereinafter express, for those injuries and damages which were proximately caused by the defendant's negligence.

In this case it is claimed that the plaintiff suffered a swollen ankle on account of her fall in a Safeway Store on June 11, 1958, from which she was partially incapacitated for approximately a month and required during that period of time some medical care.

An unusual feature of the present case is that the plaintiffs claim damages for physical injuries and physical disabilities which occurred thereafter. It is contended that she reinjured her ankle in September of 1958 and was disabled for a time and required medical treatment. It is contended that an occurrence took place in her home in February of 1959, at which time she wrenched her back; was disabled for a time and confined to bed and required additional medical care; that thereafter, due to persistent symptoms referable to her low back, she required an operation and was disabled on that account; required medical care and incurred hospital expenses. It is further contended that she was again required to be hospitalized in September of 1963 for several days for head and back injuries.

Now with respect to each complaint occurring beginning in February of 1959, before any damages may be awarded to either of the plaintiffs on account of such complaints or disabilities, you must be satisfied that each such complaint, disability or expense considered by you in fixing the amount of damages proximately resulted from any occurrence which you find took place on June 11, 1958 as a result of the defendant's negligence. That is to say you must find that "but for" the negligence of the defendant on June 11, 1958, the various complaints that the plaintiffs have, for which they seek damages, thereafter would not have occurred.

You are further instructed that, since the question as to whether a given disability, subsequent injury, or subsequent medical expense was proximately caused by the claimed earlier injury requires medical proof, you must look for evidence of proximate causation solely in the testimony of physicians. If you find there is no medical testimony on the question of whether the claimed initial injury to the plaintiff caused the plaintiff to sustain any subsequent disability, injury or expense, then you may not award any damages to the plaintiffs for any subsequent disability, injury or expense.

---

[Filed March 13, 1964]

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

You are instructed that the defense of contributory negligence is asserted by the defendant with respect to each injury sustained by the plaintiff subsequent to June 11, 1958. If you find that the plaintiff suffered from recurring weakness of the ankle or numbness of the foot and that by reasons of either or both of these conditions the plaintiff was prone to fall, you are instructed that the law imposed upon her a burden to exercise a degree of caution proportionate to the hazard of falling.

If you find that the plaintiff on any subsequent occasion when she fell and sustained injuries did not exercise that proportionately higher degree of care and caution which would be reasonably imposed upon one suffering the same or similar disability, then for such an act she would be guilty of contributory negligence.

---

[Filed March 23, 1964]

## MOTION FOR JUDGMENT N.O.V. OR FOR A NEW TRIAL OR FOR A REMITTITUR

Comes now the defendant Safeway Stores, Inc., by its attorneys, and moves the Court alternatively as follows:

1. To enter judgment for the defendant notwithstanding the verdict upon the ground that the evidence of negligence lacks substantiality.

2. To award a new trial upon the following grounds:

   a. The verdict is contrary to the weight of the evidence.

   b. The Court erred in instructing the jury.

   c. There was insufficient evidence to permit the jury to consider an award of damages on account of any injury or disability occurring after August of 1958.

   d. There was insufficient evidence that particular subsequent injuries were causally related to the accident of June 11, 1958.

   e. The verdict was grossly excessive for any injury or disability which was causally related to the defendant's negligence.

3. To order a substantial remittitur upon the ground that the verdict was grossly excessive to compensate the plaintiffs for any injury or disability causally related to the defendant's negligence.

HOGAN & HARTSON

By /s/ Paul R. Connolly
Attorneys for Defendant

[Certificate of Service]

[Filed March 13, 1964]

## VERDICT AND JUDGMENT

This cause having come on for hearing on the 10th day of March, 1964, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between MAGGIE L. BUGGS and CHARLES W. BUGGS, plaintiffs and SAFEWAY STORES, INCORPORATED, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 13th day of March, 1964, that they find the issues aforesaid in favor of the plaintiffs and that the money payable to them by the defendant by reason of the premises is the sum of nine thousand dollars ($9,000.00) for pltf. MAGGIE L. BUGGS and two thousand dollars ($2,000.00) for pltf. CHARLES W. BUGGS.

WHEREFORE, it is adjudged that said plaintiffs recover of the said defendant the sum of nine thousand dollars ($9,000.00) for pltf. MAGGIE L. BUGGS and two thousand dollars ($2,000.00) for pltf. CHARLES W. BUGGS, without costs.

HARRY M. HULL, Clerk,

By /s/ David A. Irwin
Deputy Clerk.

Judge CHARLES F. MCLAUGHLIN
Presiding

(N)

[Filed April 6, 1964]

## PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR JUDGMENT N.O.V., FOR A NEW TRIAL OR FOR A REMITTITUR

### 1. PREFATORY STATEMENT

The instant case proceeded to trial on the complaint of the plaintiffs and the answer thereto of the defendant, together with the pretrial statement. The complaint charges, inter alia, that on June 11, 1958, the female plaintiff was an invitee of the defendant at and in its store located at 1730 Hamlin Street, Northeast in the District of Columbia, and that while walking down the aisle selecting articles from the shelf, struck her right ankle and foot, violently up and against a vacant, movable platform, the same being a flat top platform that was placed, negligently, at the end of the counter and extending beyond said counter and negligently permitted to remain there without any warning of its presence, resulting in injury to her ankle and foot, requiring medical aid and causing physical debility.

The plaintiffs sought damages in the sum of $50,000.00.

The defendant's answer admits that the female plaintiff was a customer at the time she sustained the injury described in the complaint, but denied that the injury was occasioned by any negligence of defendant, and asserted the affirmative defense of contributory negligence.

During the trial the female plaintiff, testifying in her own behalf on direct examination, stated substantially as follows: That about 2:00 P.M. June 11, 1958, she went to the Safeway Store to purchase groceries, that after she had purchased five or six items, there was one which she forgot, black pepper, so she asked the stock attendant the location of the black pepper and he looked up and pointed down the aisle, so she proceeded down the aisle looking for the black pepper, that she did not know that he meant in that aisle, that she walked, not too fast, down the aisle, that when she got to the end of the shelves, she still had not found or located the black pepper. That when she went to turn the corner to go down

the other aisle on the other side, and at the end of the shelves there was a platform about instep high, and that she struck her instep and right ankle on the platform and fell over it. And that the person who was replenishing the shelves heard the commotion and came and helped her off the platform; that this person said, "I had better hurry and move this before – or put something on it before someone else falls over it"; that she was thereafter treated by Doctors, Robinson Lee and Ammerman; that she fell several times after the accident June 11, 1958, due to the weakness of her right ankle and foot.

2. NEW TRIAL, ITS HISTORY AND DEVELOPMENT

Rule 59(a) of the Federal Rules of Civil Procedure provides, inter alia, that: "A new trial may be granted to all or any of the parties and on all or part of the issues (i) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (ii) in an action tried without a jury, for any of the reasons for which rehearings have hitherto been granted in suits in equity in the courts of the United States.

"On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, to hear additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

(a) THE COMMON LAW ORIGIN TO GRANT OR DENY A NEW TRIAL

The English courts exercised the power to grant new trials for the misconduct of the jury, early in the history of the common law. But since at the early common law the jurors could and did properly decide factual issues on the basis of their own knowledge, so long as that condition continued the courts could not grant a new trial on the ground that the verdict was against the weight of the evidence. The writ of attain was employed to assuage this rigidity. The writ provided a procedure whereby a jury of twenty-four persons could inquire whether the petit

jury had given a false verdict; if so the judgment thereon was reversed, and the petit jury seriously punished. (Blackstone, Commentaries 402-405). Then in 1655 in Wood vs. Gunston, 82 Eng. Rep. 868, a common law court granted a new trial because of the excessiveness of the verdict. The Wood decision is quite generally regarded as the first reported case in which a new trial was granted on the merits. In 1757, Lord Mansfield in Bright vs. Eynon, stated that: "trials by jury, in civil cases, could not subsist now without a power, somewhere to grant new trials". And Justice Denison added, "That it would be difficult to fix an absolutely general rule about granting new trials without making so many exceptions to it, as might rather tend to darken the matter, than to explain it . . ." Bright vs. Eynon, Supra. At early common law in England the writ of error and the motion for new trial were mutually exclusive remedies. Under the English common law practice the motion for a new trial was addressed to the discretion of, and heard by, the trial court en banc; and although no appellate review could be had of the trial court's ruling, the motion received multiple-judge consideration and the work of the trial court en banc seems on the whole to have been satisfactory to litigants and the legal profession. See Hinton, Power of Federal Appellate Court of Review Ruling on Motion for New Trial (1933) 1 U. Chi L. Rev. 111, 113.

While from their inception the Federal courts exercised the power to grant a new trial for reasons warranting a new trial under the English common law, they did not, however, follow the English "en banc" practice, but instead a single judge disposed of the motion. See, 30 Tex. L. Rev. 242 (1951) and 98 U. Pa. L. Rev. 575 (1950).

(b) AS EFFECTED BY THE CONSTITUTION STATUTES AND RULES

While Section 17 of the original Judiciary Act of 1789 provided that all courts of the United States shall have power to grant new trials in jury cases – "for reasons which new trials have usually been granted in courts of law." 1 Stat. 83, Section 22 of said Act provides that there

should be no reversal in the circuit courts or Supreme Court upon writ or error for any error of fact. Approximately twenty-seven months later the Seventh Amendment was adopted, on December 15, 1791. This historic Amendment, after preserving the right or trial by jury in suits at common law proceeds to provide that: "No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It is significant, as disclosed by the foregoing developments, that any attempt to re-examine a jury verdict in a civil case, is subject to the rules of the common law of England. Neither the trial nor the appellate courts possess the powers to reverse a jury verdict on substantial factual issues. Such was the holding of the Supreme Court in 1913, in the case of Slocum vs. N. Y. Life Insurance Co., 228 U.S. 364.

The principles of Section 17 of the Judiciary Act of 1789 are now stated for the District Courts in Rule 59(a), Supra. Under this rule let us turn to the power of the trial court to grant a new trial. The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice, was well established prior to the establishment of our Government. Section 17 of the Judiciary Act of 1789 declared that for the Federal Trial Courts, now the District Courts, the Seventh Amendment restricts this power to legal errors. In the case of Capital Traction Co. v. HOF, 174 U.S. 1, 13, Justice Gray, among other things, said, "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admirality) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a jury trial; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any Court of the United States, other than according to the rules of the common law of England, that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court

in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law, and therefore that, unless a new trial has been in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

## DIRECT REPLY TO DEFENDANT'S MEMORANDUM

The defendant challenges the sufficiency of plaintiff's evidence on the issue of negligence and asserts that it was not of such substantial character for submission to the jury. It may be noted that there is no attempt on the part of the defendant to detail the unsubstantial evidence, or to pin-point it so that a legal evaluation may be made of defendant's contention of confusion and inaccuracies. The defendant cites in support of its position the case of Keiffer vs. Capital Transit Co., 94 U.S. App. D.C. 95, 214 F.2d 241 (1954), where the "per curiam" opinion of the court said: "the cause of the fall was left in such uncertainty at the conclusion of appellant's case that to permit the jury to attribute the claimed injuries to the negligency of appellee would be too speculative to warrant submission of the issue to them." The said opinion does not state the facts upon which it is buttressed. The facts, however, are well detailed in the appellee's brief, the writer of which is Counsel for the movant herein.

Appellee's brief in the Kieffer case, Supra, states the facts substantially as follows: "plaintiff fell during daylight while alighting from an eastbound Capital Transit Company bus at Fourth and E Streets, Northwest, on May 11, 1950, explaining her fall Mrs. Kieffer said: 'Well, there wasn't anything that I know of, happened except I boarded the bus at Eleventh Street, Northwest, and I came down to Fourth and got off there, and there was something on the step, – I don't know what it was – I felt it underneath the ball of my foot – and it caused me to fall, and I went down between the curb and bus and I was knocked out, I don't know what happened'. – She testified she fell from the second or

middle step. She did not fall by reason of any motion of the bus. 'I don't know what it was', she said, 'it felt like a little rock or something'. She had not noticed the surface of the steps of the bus, either before or after her fall."

Indeed there is nothing cognate between the evidence in the Keiffer case, Supra, and the instant case.

The defendant likewise cites the case of Washington Marlboro & Annapolis, Inc. vs. Maske, 89 U.S. App. D.C. 36, 190 F.2d 621, in support of its challenge and its contention. However, the uncontroverted physical evidence showed that the bus made a sudden stop in order to avoid collision with a taxicab that turned suddenly across the path of the bus. The appellee was injured as a result of the sudden stop. There was no negligence in this sudden stop, the negligence was in the act of the taxicab in suddenly cutting across the path of the bus. The appellee's remedy was against the taxicab and not the appellant. This was implicit in the reversal ordered by the Court of Appeals.

The defendant further cites the following cases in support of its position heretofore stated: Lippman vs. Williams, 79 U.S. App. D.C. 334, 147 F.2d 150; Old Dominion Stages vs. Connor, 67 App. D.C. 158, 90 F.2d 403; Montgomery vs. Virginia Stage Lines, 89 U.S. App. D.C. 213, 191 F.2d 770; and Reese v. Wells, 73 A.2d 899, 902 (D.C. Mun. App.).

The Lippman case, Supra, does not lend any factual aid to the defendant, for the reason that the issues presented were issues of law. First, was the plaintiff entitled to an instruction that when she arose from the chair to leave the store, that she was under no obligation to look at her feet to ascertain whether or not an obstruction was there. The Court of Appeals in approving the trial court's rejection of the proffered instruction, stated: "the instruction does not state the law correctly and was properly refused. The duty of exercising reasonable care in the case of a shopkeeper and his customer is reciprocal. As to the former, the duty is to exercise ordinary care to maintain the premises in reasonably safe condition for customers having occasion

to use them, and,correspondingly, the customer in the use of the premises owes the duty of exercising ordinary care for his own safety." The Court of Appeals in the discussion of a projected drawer, said: "In the instant case the drawer itself was an ordinary and usual part of the store equipment. When opened it stood about a foot and a half or more above the floor. The store was well lighted, there was ample space between the opposite cabinet for one to pass, and a glance ahead by one leaving or entering the store would have disclosed the open drawer. Appellant had visited the store on prior occasions. To one sitting, as appellant was, before she arose to leave, the drawer was within vision without looking up or down, for its top was at most an inch or more below the level of the chair seat. The instruction, if given,would consequently not have been responsive to the facts of the case and was correctly refused."

The Lippman case, Supra, was submitted to the jury and the jury found for the defendant. The foregoing appeal was prosecuted by the plaintiff. While in the Lippman case, Supra, the plaintiff walked into and fell over an open bottom hat storage drawer, and the case was submitted to the jury, yet in the instant case the "shelves" or "gondola" were around the aisle, out of view of approaching customers. The opinion in the Lippman case, Supra, supports the facts in the instant case.

The Old Dominion Stages case, Supra, does not support the contention of the defendant, because, there, the Court of Appeals held that it is sufficient if the trial court charges the jury on the evidence related to the theory upon which the plaintiff bases her case.

The record in the instant case clearly shows that the trial judge adequately instructed the jury on the law as applicable to evidence adduced at the trial.

The Montgomery case, Supra, likewise emphasizes the necessity of an instruction fully spelling out the duty of the carrier to storing passengers' baggage properly so as not to injure its passengers. The female plaintiff's testimony clearly shows that she sustained injury to her

right ankle in the Safeway Store on June 11, 1958, when her right ankle struck on platform in the aisle and fell to the floor. That she struck her knee also at the same time. The testimony further shows that she inquired of one of defendant's stock attendants as to the location of "black pepper" and was told "down the aisle"; that when she got to the end of the shelves, she did not find the "black pepper", so she started to turn the corner to go down the other aisle on the other side, and in so doing, her right ankle and instep struck the platform and she fell over it. The platform was the height of her instep and the person replenishing the shelves heard the commotion and came over and picked her up off the platform and said: "I had better hurry and move this before – put something on it before someone else falls over it". There can be no question of the legal sufficiency of the foregoing testimony, on the issue of negligence, for submission to the jury. It is only necessary that the evidence demonstrates "completely" or "substantially" in order to support a verdict of the jury. The rule was stated in the case of Simmonds vs. Capital Transit Co., 79 U.S. App. D.C. 371, 147 F.2d 570, there the Court said: "The rule, applicable on this appeal, was stated in the Shewmaker case, decided by this court two months after judgment was entered by the trial court. It requires us in deciding whether to uphold the verdict of the jury or the judgment of the court, to balance the weight of the evidence against the judge's determination and in favor of the jury's determination; the question being not whether there is sufficient evidence in the record to support the judge's findings and decision, but whether there is sufficient evidence, when construed most favorably for the party upon whom the burden of proof is imposed, from which a jury of reasonable men could properly have reached the verdict which was reached." Accord: Lind vs. Schenley, 3 Cir. 278 F.2d 79, 87-91 (1950), Cert. denied 364 U.S. 835, See, the concurring and dissenting opinion of Judge Fahy in Bennett vs. D. C. Transit System, 111 U.S. App. D.C. 411, 413, 298 F.2d 325 (1962).

There is therefore no basis in law or fact for defendant's contention

that there was no substantial evidence of negligence for submission to the jury.

The Verdict does not require the Granting of a Remittitur

"Under the law of negligence, the most generally accepted theory of causation is that of natural and probable consequences; the rule being that, in order to recover for an injury alleged to have resulted from the negligence of another, or in order that defendant, in an action for such an injury, may set up a negligent act of the plaintiff as a bar, the injury must be natural and probable consequence of the negligence, or as otherwise stated, the wrong and the resultant damages must be known by common experience to be naturally and usually in sequence – the damages according to the usual course of events, must follow from the wrong. The test is whether ordinary prudence would have suggested to the negligent person that his act or omission would probably result in injury." Conn. vs. Hillard, 82 A.2d 368 (Mu. App. D.C.).

The Court of Appeals has sustained damages in a cognate case. Thus in the case of S. S. Kresge Co. vs. Kenney, 66 App. D.C. 274, 86 F.2d 651, the court said: "the law holds responsible in damages one whose negligent act is the proximate cause of injury to another. The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred". —— In the application of these principles to situation where one injury alleged to have been caused by the negligence of another is succeeded by a further injury alleged to be the result of the first the law regards negligence on the part of the injured person which contributes to the further injury, as an efficient intervening cause, sufficient to break the chain of causation. But where the injured person is free of negligence in sustaining the subsequent injuries, the chain of causation is unbroken and the injury is compensable. Such was the case of the Plaintiff herein.

The defendant further charges that apart from the "questions of negligence", it is entitled to a new trial by virtue of the inadequacy of

evidence dealing with certain damage claims. It specifically charges that: (i) the jury, as a matter of law, should have been precluded from considering damages for any injury incurred in September, 1958, and for each subsequent incident thereafter of which the plaintiff complained." This position is vulnerable and without support in law. The law in this jurisdiction is well expressed in an exhaustive opinion by the late Chief Judge Stephen in the S. S. Kresge case, Supra. It must be shown that the plaintiff was guilty of negligence in suffering the succeeding injuries before she can be barred from recovery as to said subsequent injuries. The burden is on the defendant to prove such negligence to the same extent as the burden of proof in contributory negligence.

Since the defendant has failed to offer evidence of negligence on the part of the plaintiff in sustaining the succeeding injuries, let us examine the medical evidence to determine whether such negligence is implicit in the medical evidence. Dr. Robinson testified that on July 16, 1958, Mrs. Buggs stated that the foot and ankle felt fine but the ankle was weak; that she was advised to continue the wearing of the ankle support and that he discharged her on July 16, 1958.

That he saw her on the September 10, 1958. (Tr. 442) He states that she informed him that on September 1, 1958, she re-injured the ankle when it gave way on her; that this examination revealed swelling about the ankle, with exquisite tenderness under and to the medial side of the lateral malleolus; that she was wearing an ankle support at that time; that he then started her on ultrasound treatments. That he saw her on February 2, 1959, at which time Mrs. Buggs stated that on the previous night her right ankle gave way on her and she slipped and experienced a sudden pain in the lumbar back and that she had been given emergency treatment by Dr. Robert Lee; that the patient was confined to bed; that there was limitation of motion of the spine in extention, flexion, lateral and rotary motion. There was also para-spinal lumbar muscle spasm. (Tr. 443-444). That he next saw Mrs. Buggs on February 18, 1959, and that she said she had been in bed since February 2nd,

that she felt better, that the muscle spasm had abated, but she complained of pain in the back radiating to the leg. Dr. Robinson ordered a lumbosacral belt, exercises and physiotherapy treatment and moist heat. That he continued to treat her until October, 1959. That he then referred her to Dr. Ammerman, Neurosurgeon, because of the continuing disability in her back, and she was getting a weakness in the big toe of that leg, which was an indication of a ruptured disc which fell in the province of a neurosurgeon. That he saw Mrs. Buggs while she was a patient at Freedmen's Hospital for her disc surgery under Dr. Ammerman. That he last saw her at his office on July 29, 1963.

The testimony of Dr. Lee corroborates that of Dr. Robinson to the extent of the former's treatment of Mrs. Buggs.

Dr. Ammerman found that the patient sustained weakness of dorsiflexion on the right foot. This was as late as May 4, 1960. He further found that there was marked tenderness over the lateral aspect of the right foot and hypesthesis over the medial aspect of the right leg and foot. That outside the right foot there was tenderness and on the inner aspect of the right leg and foot there was decreased sensation. That there was marked tenderness over the 5th lumbar vertebrae. That the patient's pain was so intractable it could not be arrested with conservative treatment. That she was hospitalized September 20, 1960, at which time a myelogram was performed at Freedmen's Hospital. That this revealed a herniated lumbar disc. That she was operated on the same day at which time the extruded disc fragment was found at L 4 on the right side and removed. That while the patient's pain was greatly improved, she continued to have some pain and her foot drop remained unchanged. That she continues to walk with a limp notwithstanding the aid of a foot brace. And that she continues to be disturbed by numbness involving the right foot, particularly the middle toe and the toes lateral to it. (Tr. 476-479).

It is quite evident from the medical testimony that there was no negligence on the part of the patient and that her succeeding falls and injuries are related to and caused by, the injury sustained by her at the Safeway Store on June 11, 1958.

The casuistry, therefore, of the defendant's challenge of the succeeding injuries of Mrs. Buggs, rests in its reliance on State cases in preference to the holding of our Court of Appeals in the S. S. Kresge case, Supra.

CONCLUSION

In the light of the cases cited above and the reasons advanced, it is respectfully urged that the Defendant's Motion for Judgment N.O.V. or for a New Trial or for a Remittitur, be denied.

LAWSON, REYNOLDS & NESBITT
Attorneys for Plaintiffs

* * *

By /s/ B. V. Lawson, Jr.

[Certificate of Service]

---

[Filed April 9, 1964]

SUPPLEMENTARY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

In the defendant's earlier memorandum in support of its post trial motions, it made the point that a new trial was called for because the plaintiff failed to adduce sufficient proof of causation on the issue of subsequent injuries to entitle the jury to consider such subsequent injuries in fixing the amount of damages (Memo p. 6). It there asserted that the plaintiff failed to offer medical testimony of causation or medical testimony to explain the number of subsequent falls for which the plaintiffs sought compensation.

It will be recalled that at the trial both the Court and plaintiffs' counsel thought there was medical evidence of a physical connection between the original injury and subsequent ones.

A transcript of the testimony of plaintiffs' medical witnesses has now been provided, and it is now clear that the Court and plaintiffs' counsel were in error. There is no medical proof of causation.

It is true that each physician in reciting history stated that the female plaintiff told him she fell on subsequent occasions by reason of her ankle "giving way" (Robinson: pp. 443, 444, 446, 447; Lee: pp. 456, 457, 458, 459; Ammerman: pp. 475, 490).* But this is nothing more than the female plaintiff's statement. Because the statement is given as "history" does not give it any larger probative value.

Not one of the physicians expressed the opinion, or stated as a fact, that the plaintiff had a residual weakness from the June 11, 1958 fall at Safeway. Not one said that he found the ankle weak on account of, or by reason of, that incident.

Dr. Ammerman testified that upon his initial examination he found Mrs. Buggs to have "weakness of dorsiflexion of the right foot" (Tr. 476), "tenderness over the lateral aspect of the right foot and hypesthesia over the medial aspect of the right leg and foot" (Tr. 476-477); that after surgery for a lumbar herniated disc she continued to have a "foot drop on the right" (Tr. 477), that on account of this she had "an unstable gait" (Tr. 478); that in September 1962 she still had "a weakness of dorsiflexion of the right foot" (Tr. 478); that "she walked with a limp favoring the right lower extremity and she continued to be disturbed by numbness involving the right foot" (Tr. 478), and that on the occasion of her most recent visit "she still could not dorsiflex the right foot as well as the left" (Tr. 479) . . . and "There was still some tenderness over the top of the right foot on pressure" (Tr. 479).

However, Dr. Ammerman did not relate these findings to the Safeway accident. He testified that Mrs. Buggs told him the foot drop appeared after the February 1959 accident (Tr. 498). He doesn't know when numbness appeared (Tr. 499). He was of the opinion that, "on the basis of history", the foot drop, weakness of dorsiflexion, and other residuals were attributable to the herniated disc (Tr. 501-502, 504, 507). But the herniated disc occurred seven months after the Safeway fall and presumably immediately after a February 1959 fall at home. There was no testimony that the disc resulted from the Safeway accident or that any residuals

* Interestingly each physician uses the phrase "gave way," which is meaningless as a description of what happened or as diagnostic of what happened.

were attributable to that accident apart from the disc. Without such testimony, it was error to permit the jury to consider subsequent injuries. The jury's verdict, since it obviously included damages for injuries beyond the June 1958 incident, lacks a sufficient basis in the evidence.

The plaintiffs' pretrial statement clearly and positively asserts that the female plaintiff claimed that a ruptured disc was attributable to the defendant. There is, however, a total absence of testimony which would attribute the herniated disc to the Safeway accident.

Without medical evidence that the female plaintiff suffered an injury to her foot and ankle in the Safeway store, which was a competent producing cause of subsequent accidents, these subsequent accidents should not have been considered by the jury in awarding damages.

Without medical evidence that the female plaintiff suffered a herniated lumbar disc as a result of her fall at Safeway, the permanent or lingering disability of the female plaintiff on account of that disc problem should not have been considered by the jury in fixing damages.

Quite apart from these encompassing questions, however, is the particular one of whether there was any evidence from which the jury could conclude that the female plaintiff's fall of September 1963, which required a hospitalization of several days (Tr. 466), was causally related to the June 1958 incident. There was no such evidence. The jury's consideration of this fall, its consequent hospitalization and recuperation, and the bill therefor is without foundation.

Dr. Robinson last saw Mrs. Buggs on July 29, 1963 (Tr. 448), so he was in no position to express an opinion as to the cause of her September 1963 fall. Dr. Ammerman last saw her October 1, 1963 (Tr. 486, 503), but he did not express any opinion or make any statement of fact from which anyone could conclude that her fall in the earlier month was attributable to either the herniated disc or the residual injuries (whatever they might have been) of the Safeway incident.

Dr. Lee was permitted to read a hospital record note in connection with the September 1963 fall (Tr. 460-466), but he did not express any opinion from which the jury could conclude that the late fall was attributable to any earlier one.

Without such testimony of causation, this September 1963 episode should not have been considered by the jury.

When the absence of expert medical opinion evidence on the questions of causation and relation are viewed in conjunction with the contradictory versions of what occurred on the various occasions when the female plaintiff fell upon her foot giving way, turning or twisting her ankle, the necessity for adherence to the rule is clear. The rule is:

Where there are involved questions concerning the nature, extent and permanency of physical injury, or the probability of an injury or treatment producing a further injury or disability, which are matters beyond the ken of the ordinary juror, there must be presented expert opinion evidence by the party having the burden of proof as to such matters. Quick v. Thurston, 110 U.S. App. D.C. 169, 200 F.2d 360 (1961); Rexall Drug Co. v. Nihill, 276 F.2d 637, 643 (9th Cir. 1960); Sheptur v. Proctor & Gamble Co., 261 F.2d 221 (6th Cir. 1958); Bearman v. Prudential Ins. Co., 186 F.2d 662, 665 (10th Cir. 1951); Spivey v. Atteberry, 205 Okla. 493, 238 P.2d 814, 27 A.L.R.2d 1259 (1951); Reeder v. New York, 23 Misc.2d 311, 197 N.Y.S.2d 572 (1961).

HOGAN & HARTSON

By /s/ Paul R. Connolly
Attorneys for Defendant

* * *

[Certificate of Service]

[Filed May 19, 1964]

ORDER

This matter having come before the Court on Defendant's "Motion for Judgment N.O.V. or for a New Trial or for a Remittitur" which was filed March 23, 1964, and the Court having fully considered said Motion, the Memorandum of Points and Authorities attached thereto, the Defendant's Supplementary Memorandum of Points and Authorities which was filed April 9, 1964, Plaintiffs' "Memorandum of Points and Authorities in Opposition" filed April 6, 1964, Plaintiffs' "Supplementary Reply" which was filed April 17, 1964, the arguments on oral hearing, and the files and records in this case, and the Court being fully advised in the premises, it is by the Court this 19th day of May, 1964:

ORDERED, That the aforementioned Motion of Defendant which was filed March 23, 1964, and was captioned "Motion for Judgment N.O.V. or for a New Trial or for a Remittitur" be, and the same is hereby, denied.

/s/ Charles F. McLaughlin
Judge

* * *

---

[Filed June 10, 1964]

NOTICE OF APPEAL

Notice is hereby given this 10th day of June , 1964, that the defendant, Safeway Stores, Inc., hereby appeals to the United States Court of Appeals for the District of Columbia from the verdict and judgment of this Court entered on the 13th day of March, 1964 in favor of the plaintiffs, Maggie L. Buggs and Charles W. Buggs, against said defendant, and the denial of a Motion for Judgment N.O.V. or for a New Trial or for a Remittitur dated May 19, 1964.

/s/ Paul R. Connolly
Attorney for Defendant

* * *

---

BRIEF FOR APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 18,854

---

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, ET AL.,

*Appellee.*

---

On Appeal from the United States District Court
for the District of Columbia

---



PAUL R. CONNOLLY
800 Colorado Building
Washington 5, D. C.
*Attorney for Appellant*

*Of Counsel:*
HOGAN & HARTSON

## QUESTIONS PRESENTED

1. Whether expert medical testimony is required to prove that subsequent accidents are causally related to an initial accident where the only apparent connection is a subjective complaint of weakness of a limb, not obvious to an observer?

2. Whether a subsequently incurred injury, received while the injured party is acting for his own purposes and not out of any necessity produced by the initial injury, may be considered to have been proximately caused by the initial injury?

3. Whether a charge to the jury is correct which, in effect, instructed that only proof of contributory negligence on the part of an injured party would insulate the defendant from liability for subsequently incurred injuries?

# INDEX


| | Page |
|---|---|
| QUESTIONS PRESENTED | (i) |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF POINTS | 13 |
| SUMMARY OF ARGUMENT | 14 |
| ARGUMENT: | |
| I Without Expert Medical Opinion Evidence As to Causation, It Was Error to Permit the Jury to Award Damages for Any Disability Arising from Injuries Subsequent to the Initial Accident | 16 |
| II Falls Subsequent to June, 1958 Were Intervening Causes Which Insulate the Defendant from Liability for Their Consequences | 21 |
| III The Trial Court Insufficiently and Inaccurately Instructed the Jury with Respect to Subsequently Incurred Injuries | 26 |
| CONCLUSION | 28 |


## TABLE OF CASES


| | |
|---|---|
| Ault v. Kuiper, 279 Mich. 1, 271 N.W. 530 (1937) * | 22 |
| Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F.2d 469 (1956) | 25 |
| Hartnett v. Tripp, 231 Mass. 382, 121 N.E. 17 (1918) | 24 |
| Johnston v. Rodis, 151 F. Supp. 345 (D.D.C. 1957) | 20 |
| Maske v. W. M. & A. Coach Co., 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) | 18 |
| Quick v. Thurston, 110 U.S. App. D.C. 169, 290 F.2d 360 (1961) | 20 |
| Raymond v. City of Haverhill, 168 Mass. 382, 47 N.E. 101 (1897) | 22 |
| Rexall Drug Co. v. Mihill, 276 F.2d 637 (9th Cir. 1960) | 20 |
| S. S. Kresge Co. v. Kenny, 66 App. D.C. 274, 86 F.2d 651 (1936) * | 12, 24 |
| Sheptur v. Proctor & Gamble Dist. Co., 261 F.2d 221 (6th Cir. 1958) | 20 |
| Sporna v. Kalina, 184 Minn. 89, 247 N.W. 41, 76 A. L. R. 1280 (1931) * | 23 |
| Wagner v. Mittendorf, 232 N.Y. 481, 134 N.E. 539 (1922) | 24 |
| Wilhelm v. State Traffic Safety Comm., 230 Md. 91, 185 A.2d 715, 719 (1962) * | 18, 19 |
| Miscellaneous: | |
| McCormick, Damages § 13 (1935) | 21 |


*Cases particularly relied upon.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 18,854

---

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, ET AL.,

*Appellees.*

---

On Appeal from the United States District Court
for the District of Columbia

---

## BRIEF FOR APPELLANT

---

### JURISDICTIONAL STATEMENT

This is an appeal from final judgments in actions for damages for personal injuries allegedly suffered by Maggie L. Buggs and for loss of consortium by her husband, Charles W. Buggs. Verdicts and judgments adverse to the defendant were entered on March 13, 1964 (J.A. 132). Timely post-trial motions were filed on March 23, 1964 and were denied on May 19, 1964 (J.A. 131, 148). A Notice of Appeal was filed on June 10, 1964 (J.A. 148). Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

The action tried below was one for damages for personal injuries sustained by a patron of a self-service food store. Although questions dealing with the adequacy of the evidence to support a finding of negligence, the admissibility of evidence, the accuracy and completeness of instructions to the jury, and the propriety of certain trial procedures were raised in the District Court, the defendant's appeal will concern itself solely with the manner in which the trial court dealt with the plaintiffs' damage claims for alleged consequential injuries. Such selectivity, however, does not mean that the defendant is otherwise content with the general conduct of the trial.

On June 11, 1958, Maggie L. Buggs, the female plaintiff below, entered a Safeway store at 1730 Hamlin Street, N.E., in the City of Washington, to do some brief shopping (J.A. 25). While searching the shelves for a product, she turned the corner in a shopping aisle and struck the instep of her right foot under a low, rectangular display platform which apparently had been emptied of its merchandise (J.A. 25, 29). She partly fell, striking her knee and receiving "just a scrape" (J.A. 30) and just a small hole in her nylon stocking (J.A. 30). She received a cut on her instep (J.A. 25), but the blow was not sufficient to tear her stocking at that point (J.A. 30-31).

Later the same evening, her foot was in pain and swelling had started in the ankle (J.A. 26). She went to bed to stay off her foot (J.A. 26). Mrs. Buggs first saw a doctor, Henry S. Robinson, on June 16 (J.A. 26, 66).[1] Mrs. Buggs said that the doctor taped her ankle, gave her ultrasonic treatments (J.A. 26) and discharged her, as improved, after several weeks (J.A. 37). Dr. Robinson said he applied a bandage impregnated with medicine (J.A. 66). By July 11, he said, the swelling

---

[1] By this time, she had no complaints referrable to the knee (J.A. 66). Dr. Robinson is an orthopedic specialist (J.A. 66).

had subsided, and he ordered physical therapy and an ankle support (J.A. 67). He discharged Mrs. Buggs on July 16, 1958, as improved (J.A. 67, 71). The patient had stated that her foot and ankle felt fine, but the ankle was weak (J.A. 67). She was advised to continue wearing the support (J.A. 67).[2]

The following September, 1958, Mrs. Buggs had an experience involving her right ankle.[3] She twisted her ankle (J.A. 26, 37).[4] Dr. Robinson said he saw her on September 10, 1958 (J.A. 67). Mrs. Buggs had told him "that on September 1st, 1958, she reinjured her ankle when it gave way on her. It began to swell"(J.A. 67). The doctor said, however, that her discomfort was *not* at the instep but now on the outside of the ankle, with pain radiating to the knee (J.A. 67). He placed her upon a course of physiotherapy (J.A. 68). After six treatments, the swelling had subsided and Dr. Robinson discharged Mrs. Buggs on September 25 "much improved" [5] (J.A. 71).

On February 1, 1959, a third incident allegedly occurred, but it is difficult to reconstruct from the contradictions and inconsistencies of the female plaintiff's testimony. Upon direct examination, she stated: "I was walking across the floor [of her dining room]. My foot gave way, and I twisted my back" (J.A. 26-27). She called a neighbor, a physician, Robert E. Lee, to attend to her. (J.A. 27)

---

[2] Presumably an ace bandage (J.A. 67).

[3] She had omitted any specific reference to it on direct examination (J.A. 26).

[4] Mrs. Buggs' experiences leading to this incident are highly suspect. She started her testimony with the observation that her ankle was so weak she was using a support—"a little stick like, at times" (J.A. 38). This turned out to be a piece of trellis—or lattice—whose measurements and characteristics were vague. It was, however,—"not a cane" (J.A. 40-42). "I had to have something in my hand" (J.A. 42).

[5] Mrs. Buggs' testimony conflicted with the doctor's records. She said she had been seeing Dr. Robinson "at intervals" since July, 1958, and in September received treatments "at intervals" for three and a half months (J.A. 26). This time stretch-out was obviously to her interest since it portrayed her as being constantly in need of medical attention, but this was not supported in the testimony or records of her own physician (J.A. 71).

Dr. Lee, as a witness, related his history from a medical report (J.A. 72) prepared for Mrs. Buggs' attorney (J.A. 75).[6] "Mrs. Buggs was proceeding from the living room to the dining room when suddenly her right ankle and foot gave away as she approached a chair, the right foot striking one of the chair legs and in attempting to right herself she lurched forward and suddenly experienced excruciating pain in the lower back" (J.A. 72-73). Dr. Lee referred Mrs. Buggs to an orthopedic surgeon, Dr. Robinson (J.A. 73).

Dr. Robinson stated that Mrs. Buggs, whom he saw on February 2, 1959, had stated "that the night before her right ankle gave away on her and she slipped and experienced a sudden pain in the lumbar back" (J.A. 68-69). Dr. Robinson treated the lady until the end of October, 1959,[7] when he referred her to a neuro-surgeon, Dr. Harvey H. Ammerman (J.A. 69).

Dr. Ammerman said: "...the history I have, the patient's right foot gave way and she twisted her back. This was followed by the persistence of low back pain together with radiation of the pain down into the right leg and foot. She then developed a foot drop on the right [Emphasis supplied.]" (J.A. 76)

In September, 1960, Dr. Ammerman caused Mrs. Buggs to be hospitalized in Freedmen's Hospital in order to undergo a laminectomy for the removal of a herniated intervertebral disc (J.A. 77).

The hospital records contained an admitting history, prepared by Dr. Ammerman's associate, which stated: "...one and a half years ago the patient injured her ankle and was in a cast for six weeks. Shortly thereafter she struck her toe and a vertebral disk slipped out of place" (J.A. 81).

---

[6] He kept no office records (J.A. 75).

7 According to Dr. Robinson (J.A. 69); May 1960, according to Dr. Ammerman (J.A. 76).

A later hospital record history, in September, 1963, described the February, 1959 incident:

> Seven months later [after the Safeway accident] the patient hit the toe of her right foot against a chair, causing her to fall backwards into another chair (J.A. 54-55).

Whatever took place in February, 1959, was not referred to in the Complaint filed June 17, 1960 (J.A. 5), nor was it mentioned in the pre-trial statement of May 17, 1963[8] (J.A. 7-8). Indeed, when the female plaintiff's deposition was taken in June, 1961, after she had already been operated on for her disc problem, she denied any injury to her leg or back subsequent to June 11, 1958. She was interrogated as follows (J.A. 31):

> Q. Now, have you had any accidents since June 11, 1958?
>
> A. No, I have not, other than the ankle is weak and on the spur of the moment, still I wear low-heel shoes all the time, and it just goes down.
>
> Q. Well, have you had any falls since June 11, 1958?
>
> A. No, I have not.
>
> Q. Have you been in any other accidents that you can think of since that time? Whether it was a fall, or an automobile or anything?
>
> A. No, I have not.
>
> Q. Have you had any injury to your back or legs since June 1958?
>
> A. No, I have not. (Emphasis supplied.)[9]

---

[8] Although a herniated disc injury was claimed, the plaintiffs' pretrial statement makes it appear that the disc was a direct consequence of her Safeway accident, not, as claimed at the trial, an indirect consequence based upon a later third fall, allegedly the result of the first fall (J.A. 7).

[9] The female plaintiff at the trial insisted that she had referred at her deposition to the February, 1959 incident, wherein she injured her back. A great deal of trial time was consumed, but it finally appeared that not a word had been said (J.A. 31-35).

Whatever happened, a number of new complaints appeared in the case. Mrs. Buggs told of a numbness developing in her right foot "a little better than a month after the accident" in Safeway (J.A. 42). It spread gradually (J.A. 43), sometimes extending to the hip (J.A. 43). "It had a peculiar distribution" (J.A. 43). One side of the leg lacked sensation and the other did not (J.A. 43-44).

Dr. Robinson described a numbness in the big toe as a developing sequella to her fall in February, 1959 (J.A. 69), but Dr. Ammerman's history had it developing before that date (J.A. 76).[10] However, Dr. Ammerman's records indicated that Mrs. Buggs had told him of a right foot drop having developed after the February, 1959 fall (J.A. 76, 83), which Dr. Robinson never mentioned pre-operatively (J.A. 69-71), nor did Mrs. Buggs. And, in any event, the female plaintiff, on redirect examination, rejected all causes for her falls other than a weak ankle (J.A. 65).

Dr. Robinson in the course of his testimony did not state that any residual ankle weakness suffered by Mrs. Buggs was the result of her Safeway fall in June, 1958. He did not describe it, measure it, or diagnose its cause. He did not find any residual muscle weakness or tendon, nerve or joint impairment which explained Mrs. Buggs' subjective complaint of ankle weakness. He never expressed the opinion that all or any of her subsequent falls were medically or physically related to the first (J.A. 66-71). Following the conclusion of Dr. Robinson's testimony, one was left in the dark as to what, if anything, was wrong with Mrs. Buggs' right ankle, which explained her contention that "it gave way." Although he quoted Mrs. Buggs as attributing her fall on February, 1959 to a "giving away" of her right ankle (J.A. 68), he expressed no medical opinion that the cause of that fall was any anatomical impairment of the

---

[10] In any event, this was not thought to be diagnostically significant of anything. Local causes, unconnected with a ruptured disc, could produce "easily" such symptoms, said Dr. Ammerman (J.A. 83).

ankle resulting from the Safeway incident seven months earlier.

Although Dr. Robinson felt that the female plaintiff "probably" suffered "a ruptured disc" as a result of this February, 1959 fall, he left its treatment and a description of its consequences to Dr. Ammerman, a neuro-surgeon (J.A. 69).

Dr. Ammerman operated upon Mrs. Buggs in September, 1960, for the removal of a herniated disc. He expressed the medical opinion that such a herniation was caused by the fall of February, 1959 (J.A. 80). But he did not express an opinion as to whether that fall was in turn caused by any residual weakness, impairment, or disability of the right ankle resulting from the Safeway fall of June, 1958.[11]

He expressed the opinion that the foot drop which the patient presented when first seen by him resulted from the ruptured disc (J.A. 83-86).[12] He stated that, following surgery, the foot drop improved (J.A. 84). However, initially she developed a greater degree of numbness and sensory loss (J.A. 84). Dr. Ammerman said: "I think they [the sensory changes] were classically hysterical" (J.A. 84). They improved, but upon his last examination of October, 1963, he found a considerable complaint of sensory loss over the right foot (J.A. 84), which was attributable to the ruptured disc (J.A. 85).[13]

Upon his last examination, Dr. Ammerman stated that he found substantial residual disability in the function of the right leg of the patient (J.A. 86). But he said these residuals are "largely" the conse-

---

[11] This opinion was properly one for Dr. Robinson, since, as Dr. Ammerman said, he did not concern himself with the patient's ankle except to see if it presented any diagnostic signs of a herniated disc (J.A. 85).

[12] It logically follows that it did not preexist the February, 1959 fall and hence could not have been a cause of that fall.

[13] It logically also would follow that these sensory losses were not present before the disc was ruptured in February, 1959.

quence of "the nerve root pathology that led to the laminectomy" (J.A. 86).[14] There was no further expression of medical opinion from the plaintiffs.

The defendant called Dr. J. Peter Murphy, a neuro-surgeon, who stated that, at the time of his examination of Mrs. Buggs in January, 1964, she complained of the "absence of the full use of my right foot and toes and sensory loss as well." She also complained of pain in her back (J.A. 93). He could find no explanation for the back pain unless it was a residual of the lady's back operation (J.A. 94). He thought her complaint of sensory loss was fairly typical and an aftermath of her disc surgery (J.A. 97). He found a variation in cocking of the right foot which "could be considered to be evidence of mild residual weakness of the ankle (J.A. 97), attributable to any one of six causes" (J.A. 97-98).

The course of Mrs. Buggs' complaints of injury did not end with the September, 1959 fall. She testified that, following her disc surgery in September, 1960, and at a time when Dr. Ammerman had prescribed a foot brace in June, 1961 "so she would have a normal gait" (J.A. 77), she turned her ankle in July, 1961 (J.A. 62), and in March, 1962, she twisted her foot (J.A. 63). Subsequently, in February, 1963, "I was coming down the stairs from upstairs, down into the living room, and I thought I had my foot all the way down on one step and I did not. I lost my balance and I just slid down two or three steps into the living room. . . . Your foot did not give way? I guess it didn't" (J.A. 64).

Then in September, 1963, another fall occurred which the female plaintiff varyingly described: "In September of 1963 my foot twisted, turned. I lost my balance, fell backwards down seven flights of cement steps" (J.A. 28). The next trial day she testified: "I thought my foot

---

[14] One is left to speculate as to what is not, and whether what is not is hysterical, chronic, or due to some process unknown. Clearly, there was no testimony relating any impairment of function in the right leg to the June 11, 1958 Safeway accident.

was all the way down on the landing . . . and half of it was on the landing and half was on this part that comes down to the steps and I fell. I lost my balance and I fell backwards" (J.A. 64).

As a result of this fall, Mrs. Buggs was taken to Freedmen's Hospital. Dr. Lee, her neighbor, attended her and wrote on her hospital chart that she complained of acute low back pain, severe headaches, and general body contusions (J.A. 73). The lady remained hospitalized for five days and continued to complain of back pain and headaches upon discharge (J.A. 74). Dr. Lee said he attributed her complaints to her fall (J.A. 74). Here again, there was no attempt to attribute, medically or physically, this most recent fall, or those in July, 1961, March, 1962, or February, 1963, to the lady's original injury of June 11, 1958.

Moreover, the female plaintiff's own relation as to how each of six falls subsequent to June 11, 1958 was sustained varied considerably. On direct examination she said of the incident of September, 1958: "My foot gave way, which was very weak and I twisted my ankle" (J.A. 26). Of the incident in February, 1959, she said: "My foot gave way, and I twisted my ankle" (J.A. 26). Of other incidents between her operation in September, 1960 and her fall in September, 1963, she said: ". . .during that period I had at least three or four other ankle twists, foot twists" (J.A. 28). Of the final incident, she said: "In September of 1963 my foot twisted, turned" (J.A. 28).

The language Mrs. Buggs employed seemed not to distinguish between "gave way" or "turned or twisted." "Whenever your foot gives way your ankle is going to twist, you are going to turn your foot," she said (J.A. 61), failing to recognize that, if one turns or twists an ankle, the foot will be caused to give way. However, when she had earlier testified in an aborted trial in January, she was quite careful to distinguish among the foot mechanics involved in her various experiences.

She then attributed the falls in February and September, 1963, to

numbness in her foot, and on that account, not being aware of the correct placement of her foot (J.A. 48-49). Upon cross-examination during the March trial, she reaffirmed this statement and denied having earlier testified as quoted above (J.A. 28, 50).

In her January testimony (admitted at the March trial, J.A. 106) Mrs. Buggs denied that she had twisted her foot in either July, 1961 or March, 1962 (J.A. 22-23), and with respect to the incidents of September, 1958 and February, 1959, she at first said that she had twisted her foot (J.A. 11, 14), then denied categorically that her foot twisted (J.A. 16-17), and then denied that she had ever testified that her foot twisted (J.A. 16). In March, she said it all means the same thing (J.A. 62).

Over objection, the Court admitted into evidence all bills having to do with the female plaintiff during her entire history from 1958 to and including the September, 1963 admission to Freedmen's Hospital (J.A. 86-91).

At the conclusion of the plaintiff's case, the defendant moved "to strike from the record and instruct the jury that they should not consider any item of damage or injury subsequent to, say, August, 1958, on the ground that the incidents of September, 1958, February, 1959, the falls in March and July of 1962 and 1961, respectively, and the fall in September, 1963,[15] have not been proven to have been proximately caused on [sic] any disability resulting from the first incident at the Safeway store. There is an absence of credible substantial evidence by which the jury can find any of those injuries, damages, or disabilities was the proximate result of the earlier 1958 incident" (J.A. 92). The motion was denied (J.A. 92). The same objection was subsequently submitted in the form of a request for instructions to the jury. This too was denied (J.A. 124, 129). The defendant requested that the Court should instruct the jury, in detail and with precision, with respect to their consideration of damage claims arising from and subsequent to

[15] Counsel here omitted reference to the fall of February, 1963.

June 11, 1958 and with respect to whether there was evidence of permanent injury resulting from the Safeway episode on June 11, 1958. The request was denied (J.A. 124, 129). The Court, as its only instruction upon the extensive question of subsequently incurred disabilities, which concerned so much of the trial, said only this (J.A. 115-117):

> If you conclude from all the evidence in this case and under these instructions that the female plaintiff is entitled to recover damages from the defendant, then the measure of her recovery would be such a sum as would fully compensate her for such damages as you find she has sustained and which are shown by the evidence to be the natural and proximate consequence of the negligence of the defendant.
>
> In ascertaining what damages, if any, the female plaintiff has sustained, you may take into consideration the character of her injuries, whether or not any of them are of a permanent nature, and if so, to what extent the same may be permanent, and such pain and suffering, if any, which you may find by a preponderance of the evidence the female plaintiff Maggie Buggs was or may in the future be thereby subjected.
>
> * * *
>
> You are instructed that if you find for a plaintiff in this case, then the amount of your verdict must be based upon the evidence as to that plaintiff's injuries and losses. If your verdict is for a plaintiff you are not to award speculative damages, that is, compensation which although possible is remote, conjectural or speculative.
>
> In other words, you are to base your verdict as to damages, if you reach such a verdict, not upon conjecture or speculation, but only as a preponderance of the evidence shows the damages that actually resulted to that plaintiff from the matters complained of.

Earlier in the charge, the Court, in summarizing the contentions of the parties, stated the defendant's position in a patently erroneous way. The Court said:

> Defendant further alleges that any injuries which the female plaintiff may have sustained after that date June 11, 1958, were not the proximate result of any accident which may have occurred in its store, but

> were the result of other causes. That is, defendant claims that if the female plaintiff did suffer personal injuries after June 11, 1958, they were not proximately related to any conduct of the Safeway Stores in June of 1958, but were the result of the negligence or contributory negligence of the female plaintiff. (J.A. 108) (Emphasis supplied.)

So stated, the defendant assumed an unnecessarily difficult burden of persuasion with the jury, especially when the jury were also told that the burden of proof as to contributory negligence rested with the defendant (J.A. 114).[16]

The defendant's counsel pointed out the error of statement, stating in part (J.A. 122): "Your Honor did not make it clear that that [contributory negligence] was an alternative defense. The principal defense we make is that there is no proof of proximate causation."

Defendant's counsel objected to submitting the question of permanent injuries to the jury (J.A. 124), and further objected to submitting the question of damages, disability or injury beginning in September, 1958 (J.A. 124).

By its unprecise statement, the trial court effectively relieved the plaintiffs of their difficult burden of proving proximate causation as to injuries, damages, and disabilities beginning in September, 1958 and running for five years. The burden was shifted, after the evidence was closed, to the defendant to establish that the female plaintiff was contributorily negligent in each of the six falls she sustained subsequent to June 11, 1958.

---

[16] The matter was re-emphasized (J.A. 110-111). The Court said: "You are instructed that the defense of contributory negligence is asserted by the defendant with respect to each injury sustained by the plaintiff subsequent to June 11, 1958." Of course, the Court was attempting to state the law in accordance with this Court's opinion in S. S. Kresge Co. v. Kenny, 66 App. D.C. 274, 86 F.2d 651 (1936), but the result was aberrant.

The male plaintiff's general claim for damages for loss of consortium was also submitted uncritically to the jury (J.A. 116). Verdicts totaling $11,000 for both plaintiffs were returned upon which judgments adverse to the defendant were entered (J.A. 130). Post-trial motions for a new trial and for a remittitur were made upon the following grounds:

> . . . (c) There was insufficient evidence to permit the jury to consider an award of damages on account of any injury or disability occurring after August 1958;
>
> (d) There was insufficient evidence that particular subsequent injuries were causally related to the accident of June 11, 1958;
>
> (e) The verdict was grossly excessive for any injury or disability which was causally related to the defendant's negligence (J.A. 131).

When these motions were denied, this appeal followed (J.A. 149).

## STATEMENT OF POINTS

The appellant assigns as error:

1. The refusal of the trial court to instruct the jury that there was not adequate evidence to prove that any item of injury or damage sustained by the plaintiffs subsequent to August, 1958 was proximately caused by the defendant's negligence of June 11, 1958, and that accordingly, no award should be made on account of any such subsequently incurred injury or damage.

2. The refusal of the trial court to instruct the jury properly, precisely, and fully as to how they should consider the plaintiffs' claims of damage and injury incurred subsequent to August, 1958, specifically that the burden was upon the plaintiffs to establish that each incident or episode, injury, or damage incurred after August, 1958 was proximately caused by the defendant's original negligence, and that, if any such incident, episode, injury, or damage was not found by the jury to be in fact

the direct result of the negligence of the defendant, they should disregard it; and that alternatively, if any item of subsequently incurred damage was found to have been caused by the defendant's negligence, the jury should still disregard it, if any negligence on the part of the female plaintiff contributed in any degree thereto.

3. The refusal of the trial court to instruct the jury that no awards should be made to the plaintiffs for any permanent injury.

## SUMMARY OF ARGUMENT

The female plaintiff suffered a relatively insignificant injury to her right instep in a Safeway store on June 11, 1958. She attempted to relate six subsequently experienced falls over the next five years to that incident. One fall sustained in her own home in February, 1959 appeared to have serious consequences in that it was thought to have caused the herniation of a lumbar disc and other disability. However, there was no medical testimony adduced by the plaintiffs which established (a) that any disability or injury resulted from the Safeway episode which was reasonably likely to, or which did, produce an instability or deficit in the right lower leg, or (b) that any such instability, deficit, or disability caused any subsequent fall. This is especially important with respect to the serious fall of February, 1959. Although perhaps lay conclusions could be drawn, from the disability resulting from the herniated disc as described by physicians, that falls experienced subsequent to February, 1959 were caused by that fall, there was no expert testimony, either of fact or opinion, from which the jury could have reasonably concluded that the February, 1959 episode was attributable to any continuing disability from June, 1958 or subsequently incurred disability on account thereof.

I. Proof that the plaintiff did sustain an injury and that it was a competent producing cause of a later accident was required to be furnished by medical experts. However, no such testimony was given by

any physician called as a witness. This rule has special application where the complaints and symptoms are entirely subjective. The vague, unsubstantial, and subjective expression of the female plaintiff that she fell because her ankle was "weak" is an inadequate basis for a finding of proximate cause, especially when the female plaintiff's different descriptions of the mechanics of her falls were so varied and contradictory and so motivated by self-interest.

II. Furthermore, any subsequently incurred injury or damage did not result from the operative effects of the original incident. Each was the result of a subsequent, independent, and self-operating cause. For whenever the originally injured person is no longer recuperating and no longer under therapy on account of his initial injuries so that it cannot be said that the defendant's conduct has forced or brought about the subsequent activity which produces another injury, the subsequent injury is held to be independently, and not consequentially, produced. Although the plaintiff in such circumstances may be compensated for any residual disability which inheres in the result of the first accident, he is not entitled to recover for further subsequently incurred disability which may have been due to that inherent physical limitation.

III. But assuming that sufficient proof existed to permit a finding that subsequently incurred injuries and damages resulted from the initial Safeway incident, the defendant was entitled to have the jury properly instructed so that its contentions were correctly understood. Inaccurately, the jury was informed that the defendant contended only that each of the subsequently incurred accidents resulted from the female plaintiff's contributory negligence. The jury was not informed that the defendant principally contended there was not adequate proof of proximate causation.

## ARGUMENT

### I

### Without Expert Medical Opinion Evidence As to Causation, It Was Error to Permit the Jury to Award Damages for Any Disability Arising from Injuries Subsequent to the Initial Accident

As extensively detailed in the Statement of the Case, there was no testimony elicited during the trial below which laid the cause of all or any accidents or injuries suffered by the female plaintiff subsequent to June 11, 1958 to a disability incurred as a result of striking a platform in the Safeway store, except the female plaintiff's own assertion that on several occasions she twisted her ankle "because my foot is very weak" (J.A. 28).

Even now, after a detailed study of the written transcript, one cannot know what is the matter with Mrs. Buggs' right ankle except her highly subjective complaint that it is weak.

After her initial injury, she was treated by a competent orthopedic specialist. Yet he was not asked about, nor did he describe, any pathological condition in the female plaintiff's right leg which was or could have been productive of a chronic weakness. He was not asked to express an opinion as to whether the fall of September, 1958 was the result of any injury or residual disability sustained in the Safeway store incident of June 11, 1958. Nor was he asked to express an opinion as to whether the fall of February, 1959 was the result of any disability sustained in either June or September, 1958.

Clearly, there was evidence from Dr. Robinson that Mrs. Buggs "probably" suffered a disc herniation in the incident of February, 1959, and Dr. Ammerman detailed several residual findings about which he expressed the opinion that they were the result of the nerve root pathology arising from that fall. But these opinions did not go back far enough.

The first hiatus in the proof was the most important. There was no medical testimony which charged the admittedly serious fall of February, 1959 to the Safeway accident seven months earlier.

Dr. Robinson was not asked whether he compared the muscle strength of the right and left foot; whether he judged the right foot was weak from any active or passive motion he observed; whether motor and reflex mechanisms of the right foot were subnormal, or whether there was any muscle atrophy. He did not describe any tendons, ligaments, muscles, or nerves as being damaged or impaired. In short, Dr. Robinson did not state, as fact or opinion, that his patient suffered from any anatomical or pathological injury or disability; that any such condition resulted from the Safeway store incident, nor that any subsequent incident resulted from the events which transpired in that store. Neither did Dr. Ammerman who, admittedly, was not concerned with the problem.

The question of further disabling incidents and the existence of permanent injuries is also involved with the February, 1959 fall. Following the female plaintiff's fall at home in February, 1959, she began to develop leg and back complaints. Dr. Ammerman described a foot drop. Numbness commenced, which, although exaggerated and thought to be somewhat hysterical, lingered and was said to be partly responsible at least for falls in February and September, 1963, and the hospitalization consequent to the latter. Back complaints persisted, and even after surgery she suffered a functional impairment of the right lower extremity. These disabilities, however, are related in terms of cause and effect only to the February, 1959 episode. If that is not tied to June, 1958, there is no evidence that the incidents in July, 1961, March, 1962, February, 1963, or September, 1963 resulted from the defendant's conduct, and no evidence of permanent injury attributable to the Safeway store accident.

The question for decision, therefore, is whether any or all of the

injuries and damages sustained by the plaintiffs subsequent to June, 1958[17] may be considered by a jury in fixing the amount of the plaintiffs' verdict when the only evidence of proximate causation is the female plaintiff's subjective statement that her right foot was weak.[18] Put in more precise terms, the question is whether the jury should have been permitted to consider whether the fall in the plaintiffs' home on February 1, 1959, and the ruptured disc and other consequences arising therefrom were caused by a residual disability remaining from the Safeway store incident of June 11, 1958, without expert medical opinion testimony that an injury or disability had been sustained in that first accident whose residual consequences were productive of an instability or weakness which was reasonably likely to cause a subsequent fall.

Undoubtedly, there are many cases when the causal nexus between negligence and injury need not be proven by expert testimony. Amputations, disfigurements, broken bones are familiar examples. Where the connection is more subtle, not apparent to an observer, and rests upon subjective factors and an evaluation of symptoms, a different rule applies which, to prevent a jury from being arbitrary, requires that causation be established by expert testimony.

The matter has been aptly and recently stated in *Wilhelm v. State Traffic Safety Comm.*, 230 Md. 91, 185 A.2d 715, 719 (1962):

> There are, unquestionably, many occasions where the causal connection between a defendant's negligence and a disability claimed by a plaintiff

---

[17] This date is used for convenience of expression. It could be July 16, 1958, when the female plaintiff was discharged from medical care, or as put to the trial court, August, 1958.

[18] The credibility of the lay witness should certainly be a factor for consideration, especially when the self-interest and contradictions in the testimony are as apparent as they are upon the present record. It is doubtful whether a jury could rationally conclude that the principal episodes about which the female plaintiff complains resulted from a weak ankle, especially in the light of her categorical denial of re-injury to her back or leg as expressed in her pretrial deposition. Cf. Maske v. W. M. & A. Coach Co., 89 U.S. App. D.C. 36, 190 F.2d 621 (1951).

> does not need to be established by expert testimony. Particularly is this true when the disability develops coincidentally with, or within a reasonable time after, the negligent act, or when the causal connection is clearly apparent from the illness itself and the circumstances surrounding it, or where the cause of the injury relates to matters of common experience, knowledge, or observation of laymen. [ Citations]. However, where the cause of an injury claimed to have resulted from a negligent act is a complicated medical question involving fact finding which properly falls within the province of medical experts (especially when the symptoms of the injury are purely subjective in nature, or where disability does not develop until some time after the negligent act), proof of cause must be made by such witnesses. [ Citations and examples].

*Wilhelm* itself provides two examples. Mrs. Wilhelm was a passenger in an automobile which was struck from behind. Her neck was jerked backwards. Complaining of pain, she was treated briefly at a hospital and then for some time by an orthopedic surgeon who diagnosed her case as "a severe whiplash sprain of the neck and back." She progressed and her symptoms reduced and were less intense. She then began to develop hysterical or psychosomatic complaints and intense back pain coincident with her menses. Whether these complaints, arising several months after the accident and involving subjective symptoms and necessitating medical fact-finding, were caused by the automobile accident required expert medical testimony, said the Court. But a depigmentation on her face, which was not present before the accident and which developed with the reduction of a bruise to the same area, received in the accident, was held to contain such a probability of causal connection as to dispense with the requirement for expert testimony.

Although this Court has not been called upon to decide when expert testimony is required in order to establish the causal nexus between an injury and a subsequently incurred disability, it has adopted the principle that expert testimony is required to establish proximate causation of injury or disability resulting from negligence when the matter is not

within the common experience of the layman. *Quick v. Thurston,* 110 U.S. App. D.C. 169, 290 F.2d 360 (1961); *Johnston v. Rodis,* 151 F. Supp. 345 (D. D.C. 1957) approved on this point, but reversed on other grounds, 102 U.S. App. D.C. 209, 251 F.2d 917 (1958). See also *Rexall Drug Co. v. Mihill,* 276 F.2d 637 (9th Cir. 1960); *Sheptur v. Proctor & Gamble Dist. Co.,* 261 F.2d 221 (6th Cir. 1958).

In the present case it is not at all obvious that in September, 1958 Mrs. Buggs should have fallen from a residual weakness in her right foot or that a subsequent fall in February, 1959 should have proceeded from the same condition. It is not common experience that a blow to the instep followed by pain and swelling which subsides over the next several weeks will leave the foot "weak." Although the female plaintiff, who once quibbled about the precise action which occurred at each episode of falling, now would have the reader assume that "whenever your foot gives way . . . your foot is going to twist over—from weakness of the foot" (Tr. 406), the matter is not so apparent.

The dynamics of walking is really a complicated bit of coordination albeit unconsciously mechanical. It is common experience that, due to lack of attention, the momentary failure of coordination or causes kept from consciousness, people trip, stumble, or twist their ankle. And when they do, to prevent a serious injury, body musculature reacts to cause a joint such as an ankle to "give way," but the converse is not so apparent—how a foot, even one "weakened," can give way and produce a twist or turning of the ankle. Unless the female plaintiff's claimed disability was explained, it would be more probable to assume that in February, 1959, while in her home, she made a misstep which caused her back wrenching.

In any event, the point to be emphasized is that the jury could not have known that there was in fact a disability existing at the time of subsequent falls which resulted from the defendant's negligence. The highly personal, subjective complaint of weakness, especially in view

of the contradictory versions given of the various episodes, was inadequate proof of proximate causation. Since a weak ankle is not apparent to an observer; must vary greatly in individuals, and requires evaluation to assay its significance in producing any failure of foot mechanics, expert medical opinion testimony was required.

## II

### Falls Subsequent to June, 1958 Were Intervening Causes Which Insulate the Defendant from Liability for Their Consequences

The common law favors the concept that for a single injury there should be a single recovery. *McCormick, Damages* § 13 (1935). Accordingly, if the female plaintiff's right foot was injured in the Safeway accident of June 11, 1958, she should be compensated for the extent of that injury, but not for the subsequent injuries she may have received from any residual weakness of that foot. Otherwise, the defendant is made an insurer of the plaintiff's future safety since every subsequent misstep may be laid to the original injury.[19]

The correct principle is: If a person, who has sustained a prior injury and has some residual weakness or disability on account thereof, ventures to go about upon his own affairs, not out of any necessity connected to the original injury, and not upon a course of therapy or while following a physician's order, and is injured on account of that disability, the subsequent injury is considered to be an independent, intervening event for which the original tortfeasor is not liable.[20]

---

[19] To assure uniformity of treatment, the concept of a single recovery for a single injury should be preserved. Otherwise, the claimant who brings his case late in the day may chance a better recovery (because more has happened to him) than the diligent claimant who early presents his case.

[20] If the subsequent accident was caused by negligence, that wrongdoer should then assume that burden of compensation, for a tortfeasor does, in fact, take his victim as he finds him.

A remarkably similar case is *Ault v. Kuiper*, 279 Mich. 1, 271 N.W. 530 (1937). It there appeared that the plaintiff suffered a sprained left ankle as a result of an automobile accident of June 19, 1935, which was clearly due to the defendant's negligence. She was hospitalized and, upon returning home, spent two or three weeks in bed. "When she started to get up, she was able to walk by being careful, although the ankle did turn over and threw her on occasions." On December 3, 1935, while descending the steps in her house, after arising from her second floor bedroom, and, while holding onto a handrail, she said that her left ankle turned over. She fell down the stairs and fractured her right leg. The jury was required to return separate verdicts for each injury. The jury found against the defendant as to the second accident, but this was set aside with directions to enter a judgment upon the first verdict only. In thus disposing of the case, the Supreme Court of Michigan said:

> [The second injury] was sustained in plaintiff's home while she was about her own personal affairs and not sustained while she was in a hospital or other institution, or in the course of treatment for her original injury, or while being transported because of her original injury, nor did the latter injury occur when plaintiff was performing any act recommended by a physician.

The Court held that the second injury was too remote a consequence of the defendant's original negligence and that it was, therefore, an independent and separate occurrence for which the defendant was not liable.

The principle is of long standing. In *Raymond v. City of Haverhill*, 168 Mass. 382, 47 N.E. 101 (1897), the plaintiff received a second injury due to a fall in her home when she stepped from a chair to a settee. She testified that her right ankle failed to support her due to residual weakness from an earlier accident. The Court held that the defendant was not answerable for the second accident, saying:

> . . . she was not acting from any necessity caused by her previous injury, but acting independently and voluntarily, and as a result of her voluntary conduct she was again injured. A new and independent cause intervened between the original injury and the injury she received on October 9.

In *Sporne v. Kalina*, 184 Minn. 89, 247 N.W. 41, 76 A.L.R. 1280 (1931), it appeared that the plaintiff's intestate suffered fractures of both legs in an automobile accident caused by the defendant's negligence. Two and one-half months after he was first permitted to bear weight on his lower extremities and after he had been ordered to discard his crutches and attempt to walk about, he fell from the basement steps, fractured his skull, and died. His wife testified that she saw his legs appear to give way at the time of his second fall. The Court held that the head injury and subsequent death were not results for which the defendant could be liable, saying:

> But the Court is of the opinion that defendant's negligence of July 1 was not the natural, direct, or proximate cause of decedent's death seven months later, even though his disability from the fractures may have contributed to his fall. One may sustain a personal injury, the loss of a limb for instance, and years afterwards the loss of the member may have an appreciable connection with another bodily injury; yet it would not be thought legally proximate so that the original negligent party was all along the intervening time carrying the risk of some ill result in the happening of which his negligence of years before would have a responsible part. The decedent was moving about for no object connected with his cure, for no purpose incidental to it, and at a place where no one can account for his being on either business or pleasure. He was well towards recovery. There is no evidence of any refracture of the bones fractured or injured on July 1. Some time the force of the original negligence must be at an end and the law's protection cease. It is difficult to fix the point. Here it should be held that the injury in the auto accident was not a legally proximate cause of the injury from the

> fall through the disability from the first injury may be found to have an appreciable connection with the final ones.[21]

An aptly analogous case was decided by this Court in *S. S. Kresge Co. v. Kenny,* 66 App. D.C. 274, 86 F.2d 651 (1936). Although the ground for decision is the plaintiff's contributory negligence, its rationale recognizes the principle of intervening causes and, in fact, the case should have been decided upon that ground.

The facts disclosed that an elderly female chiropractor fell on the stairs of a Kresge store, through the negligence of an employee, and suffered a fractured pelvis. She was under treatment for many months but healing of the fracture did not occur. Ten months later she was not able to walk unassisted, according to some testimony. Other evidence supported the conclusion that she could walk only with difficulty. Upon the critical occasion, she awakened during the night and got out of bed to reach a water bottle nearby. "I thought, well I am not very steady, but I think I can get it," she testified. Even though the plaintiff's physician had testified that "the original injury was responsible for the subsequent fall in October, 1934 by its productive instability," this Court said, 66 App. D.C. at 278: ". . . we think the evidence such that no reasonable juryman could fail to conclude that the plaintiff was negligent at the time of the second fall."

The case was a hard one and whether the extent of the plaintiff's disability was so obvious to her that she was foolhardy as a matter of law is a difficult and perhaps harsh judgment. The decision would have better rested upon considerations of proximate cause. If she was permanently crippled at the time of her original accident, as her physician

---

[21] The present case is to be carefully distinguished from cases such as Hartnett v. Tripp, 231 Mass. 382, 121 N.E. 17 (1918), where a crutch slipped, and Wagner v. Mittendorf, 232 N.Y. 481, 134 N.E. 539 (1922), where a leg refractured in the course of performing exercises ordered by a physician.

testified, then the effect of the defendant's negligence was over. It had run its course. The second accident could not be said to be the direct result of the first, except that all events are borne out of earlier times. Can it be said, in terms of proximate cause, that a fall into a ditch by a man, blinded at birth from negligence, was the result of the earlier act?[22] Is the matter not more clearly viewed simply as an accident which befell a blind man. The original tortfeasor's act had completed its work when it resulted in blindness. It should not be thought of as still operative.

Thus the principle earlier espoused in this argument is found to be more sound. When a subsequent injury arises during recuperation from a first, or while following a course of therapy, or while engaged in some activity compelled by the initial injury, the effect of the original wrong is conceived as still operative and hence, other factors being established, the original tortfeasor would be liable therefor. But when the subsequent injury occurs while the plaintiff is engaged in his own pursuits, not upon a course of therapy or recuperation and not as a consequence of injury connected activity, even though it arises out of residual disability from an earlier accident, the original negligence is no longer actively operative and the causal nexus is broken. There is a new beginning.

Mrs. Buggs at the time of her September, 1958 and February, 1959 accidents was not following any course of therapy. She was not injured in the pursuit of any activity which the original injury required of her. The defendant's negligence was not still operative. If she had a weakness of her right foot which was a residual disability from the first accident, she was entitled to be compensated for that but not for after occurrences.

---

[22] If the question were answered affirmatively, when would limitations expire? Cf. Hanna v. Fletcher, 97 U.S. App. D.C. 310, 231 F.2d 469 (1956).

III

## The Trial Court Insufficiently and Inaccurately Instructed the Jury with Respect to Subsequently Incurred Injuries

It was made abundantly clear to the trial court, by means of a motion made at the conclusion of the plaintiffs' case (J.A. 92) and by a tendered instruction (J.A. 129-130), that the defendant principally contended that there was inadequate proof of causation to permit the jury to relate subsequently incurred injuries and damages to the store episode of June 11, 1958. Even though its position was that the question of subsequent injuries should not have been submitted to the jury, the defendant was nevertheless entitled to have the jury instructed that the plaintiffs carried the burden of proving that such injuries and damages were the proximate result of its negligence.

However, the trial court, when stating the contentions of the parties with respect to this important aspect of the case, told the jury that the defendant simply contended these other injuries were the result of the female plaintiff's contributory negligence (J.A. 108).[23]

When to this was added the further instruction that the burden of proof with respect to contributory negligence was upon the defendant (J.A. 114), the result was to turn about the burden of persuasion on this entire issue. It appeared as if the only defense offered to the plaintiffs'

---

[23] Although in the introductory sentence, the trial court said that the defendant contended that any after-incurred injuries were not the proximate result of the Safeway store incident, the meaning of this was quickly distorted. The pertinent portion of the charge stated (J.A. 108):

> Defendant further alleges that any injuries which the female plaintiff may have sustained after that date, June 11, 1958, were not the proximate result of any accident which may have occurred in its store, but were the result of other causes. That is, defendant claims that if the female plaintiff did suffer personal injuries after June 11, 1958, they were not proximately related to any conduct of the Safeway Stores in June of 1958, but were the result of the negligence or contributory negligence of the female plaintiff. (Emphasis supplied)

claims for compensation for subsequently incurred injuries was the defense of contributory negligence.

Furthermore, although the Court was requested to instruct the jury precisely and in detail with respect to the necessary findings required to establish proximate causation with respect to after incurred injuries, it refused to do so (J.A. 122). The jury was not told that they were required to make a finding that each subsequent episode, especially the important one of February, 1959, was the proximate result of the incident of June 11, 1958.

Instead, the jury was instructed only in the most sterile and perfunctory manner with respect to this major issue in the case (J.A. 115-116):

> If you conclude from all the evidence in this case and under these instructions that the female plaintiff is entitled to recover damages from the defendant, then the measure of her recovery would be such a sum as would fully compensate her for such damages as you find she has sustained and which are shown by the evidence to be the natural and proximate consequence of the negligence of the defendant.

This was an inadequate instruction for such a case as this.

## CONCLUSION

There was inadequate proof of proximate causation to have permitted the jury to award damages to the plaintiffs for subsequently incurred injuries and damages. Specifically, there was not sufficient proof that the female plaintiff's fall of February, 1959 resulted from any anatomical or pathological condition caused by the incident of June 11, 1958.

In addition, the jury was erroneously, imprecisely, and inaccurately instructed as to this important issue.

Respectfully submitted,

PAUL R. CONNOLLY
*Attorney for Appellant*

800 Colorado Building
Washington 5, D.C.

BRIEF FOR APPELLEES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,854

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, et al.,

*Appellees.*

On Appeal from the United States District Court for the District of Columbia



**BELFORD V. LAWSON, JR.**
1725 K Street, N. W.
Washington, D. C. 20006
*Attorney for Appellees*

*Of Counsel:*

LAWSON, REYNOLDS, NESBITT & CHAIKIN

## COUNTER QUESTIONS PRESENTED

1. Whether casual connection between an original negligent injury and subsequent injuries may be established by non-expert testimony, where the causes of the injuries relate to matters of common knowledge, experience or observation of laymen?

2. Whether intervening causes arise as a matter of law to bar recovery for subsequent injuries where causation is established primarily, by non-expert testimony, and corroborated by medical evidence and treatments?

3. Whether the trial court fully and fairly charged the jury on all elements of the case?

# INDEX


| | | | Page |
|---|---|---|---|
| COUNTER-STATEMENT OF THE CASE | | | 1 |
| SUMMARY OF ARGUMENT | | | 9 |
| ARGUMENT: | | | |
| I. | A. | The Record Considered as a Whole Discloses Substantial Evidence of Causation Among Original and Subsequent Injuries | 10 |
| | B. | Appellant Was Not Then, and is Not Now, Entitled to a Directed Verdict on the Issues of Subsequent Injuries | 16 |
| | C. | The Evidence of Mrs. Buggs, Alone, on the Issue of Proximate Cause of Subsequent Injuries Was Sufficiently Adequate | 22 |
| II. | A. | It is Implicit in the Jury Verdict that the Falls Subsequent to June 11, 1958, Were Proximately Caused by the Fall of June 11, 1958 | 28 |
| | B. | Appellant's Cases Cited in Support of Its Argument II | 32 |
| | C. | State Cases Supporting Appellees' Judgments Below | 34 |
| III. | | The Trial Court Adequately and Correctly Instructed the Jury on the Law of Responsibility for Subsequently Incurred Injuries | 36 |
| CONCLUSION | | | 43 |


## TABLE OF CASES


| | |
|---|---|
| Hartnett v. Tripp, 231 Mass. 382, 121 N.E. 17, 18 | 34 |
| Haut v. Kleene, et al., 320 Ill. 273, 50 N.E. 2d 855 | 37 |
| Hyvonen v. Heckor Iron Co., 103 Minn. 331, 115 N.W. 167 | 34 |
| Klein, etc. v. Price, ___ U.S. App. D.C. ___, ___ F. 2d ___, (No. 18,152, decided March 26, 1964) | 36 |

Page

Lavender v. Kurn, 327 U.S. 645, 653 (1946) . . . . . 36

Lippman v. Williams, 79 U.S. App. D.C. 334,
147 F. 2d 150 . . . . . 42

Madison v. White, 60 App. D.C. 329,
54 F. 2d 440 . . . . . 42

Meiselman v. Crown Height Hospital,
285 N.Y. 389, 34 N.E. 2d 367 . . . . . 23

Moore v. City of Kalamazoo, 109 Mich. 176,
66 N.W. 1089 . . . . . 38

O'Donnell v. Pennsylvania Railroad Co.,
122 F. Supp. 899 (1954) . . . . . 27

Robinson v. Bradshaw, 92 U.S. App. D.C. 216,
206 F. 2d 435 . . . . . 20

S. S. Kresge Co. v. Kenny, 66 App. D.C. 274,
86 F. 2d 651 . . . . . 16, 29, 30, 32, 33, 35

Slocum v. New York Life Insurance Co.,
228 U.S. 364 . . . . . 17, 28

Smith v. Northern Pacific Railway Co.,
211 Mich. 350, 178 N.W. 710, 711 . . . . . 33

Sommerseth v. United States (Ed. Pa.)
91 F. Supp. 457 . . . . . 31

Stahl v. Southern Railway Co.,
211 Mich. 350, 178 N.W. 710, 711 . . . . . 33, 35

Sullivan v. Capital Traction Co., 34 App. D.C. 358 . . . . . 42

Valente v. Bourne Mills, 77 R.I. 274, 75 A. 2d 191 . . . . . 26

Weiting v. The Town of Ministon, 77 Wis. 523,
46 N.W. 879 . . . . . 39

Wilhelm v. State Traffic Safety Comm.,
230 Md. 91, 185 A. 2d 715, 719 (1962) . . . . . 24, 25

Yturbide v. Metropolitan Club,
11 App. D.C. 180, U.S. Ex Rel. . . . . 42

Zipprich v. Smith Trucking Co.,
2 N.Y. 2d 176 (1956) . . . . . 30

## OTHER AUTHORITIES


| | Page |
|---|---|
| American Jurisprudence, 15, 492, Sec. 83, Damages | 22, 23 |
| C. J. S. 65, 1096, Sec. 244, Negligence | 26 |
| Green, Judge and Jury, 389 (1930) | 31 |
| Legal Anatomy and Surgery, Malloy, pp. 286, 287 | 19, 20 |

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 18,854

---

SAFEWAY STORES, INC.,

*Appellant,*

v.

MAGGIE L. BUGGS, et al.,

*Appellees.*

---

On Appeal from the United States District Court for the District of Columbia

---

## BRIEF FOR APPELLEES

---

### COUNTER-STATEMENT OF THE CASE

This action for damages resulting from personal injuries sustained by appellee, Maggie L. Buggs, and for loss of consortium by her husband, appellee, Charles W. Buggs, was commenced in the court below pursuant to the provisions of Title 11, Section 306, D. C. Code, 1961 Edition, as amended by the Act of Congress dated October 23, 1962, 76 Stat. 1171.

A pre-trial order was filed in which the respective parties agreed that on June 11, 1958, the female appellee was a customer in a store owned and operated by appellant at 1730 Hamlin Street, N. E., Washington, D. C., when her foot came in contact with an empty display platform. The said order further provided that the female appellee claimed that while she was selecting articles from a display case, her right ankle and foot were caused to strike violently up and against an empty movable, flat-top, platform, which extended beyond the counter out into the aisle and was four or five inches above the floor occupying space that was designed for customer use in the selection of articles.

She further asserted in said order that the said platform was placed and maintained at the end of said counter, and that its placement and maintenance constituted negligence, and that the appellant failed to warn her of its said presence.

She further asserted that her injuries and damages were caused by the said negligence.

That the said pre-trial order further provided that the female appellee claimed the following injuries resulting from said negligence: a ruptured or slipped disc in her back, bruised and contused ankle and instep causing damage to a nerve and permanent damage to her back and ankle. That the male appellee sought recovery for the loss of consortium and society of his said wife.

The said pre-trial order further provided an aggregate out of pocket expenditure of $2974.00.

Treating the evidence chronologically during the trial of the issues, the substance of the case is as follows: Mrs. Buggs testified on direct and cross-examination that on June 11, 1958 while a patron of the Safeway Store between 2:00 and 2:30 P.M., she struck her right instep and ankle against an unoccupied platform the height of her instep, and fell over on it, as she turned the corner aisle to go down the other aisle, in pursuit of the purchase of black pepper; the stock employee came and

helped her off the platform; that she went to the manager and showed him her knee which was cut and slightly bleeding (Tr. 6, 11). That she consulted Dr. Henry Robinson on June 16, 1958, complaining of soreness and swelling in her right foot. That the pain went up the leg as far as the knee; that he administered hydrotherapy treatments and that she was under his professional care approximately six weeks (Tr. 13, 14); that the soreness was in the instep and ankle, that a cast was placed on the leg; that after six or seven weeks under Dr. Robinson's professional care, she was discharged as improved (Tr. 16). (J.A. 10-14)

Mrs. Buggs further testified that on February 1, 1959, she was proceeding from the living room into the dining room when suddenly her right ankle and foot gave way as she approached a chair, the right foot striking one of the chair legs and in an attempt to right herself, she lurched forward and suddenly experienced excruciating pain in the lower back; this pain was so severe she had to be carried to a couch; that she remained unable to move until seen by Dr. Lee, at which time she felt quite nauseated because of the continuing pain in her back (Tr. 421); that her falls were all caused by weakness of the ankle (Tr. 421). That she was put to bed for three weeks. Mrs. Buggs further testified that in September of 1963, she was outside in the yard, that she was standing on the top of the landing of the step, that she thought her foot was all the way down on the landing of the steps, but that half was on the landing and half was on the part that comes down to the steps and she lost her balance and fell backward; that her foot gave way (Tr. 414). (J.A. 13-14)

Dr. Robinson testified that he examined Mrs. Buggs on June 16, 1958 and applied ethyl chloride spray and strapped the leg and ankle with an ace bandage and ordered crutches; that later her leg was placed in a "gelo" cast; that this cast was removed July 11, 1958, at which time the swelling had subsided and she was given hydrotherapy treatments (Tr. 440-441). "That on July 16, 1958, she said the foot and ankle felt fine but the ankle was weak. She was advised to continue to wear the ankle support, and she was discharged as of the above date."

"That she injured her ankle on September 1, 1958, when it gave way on her. That the pain was in the region of the anterior tibial tendon over the joint space; that his examination revealed swelling about the ankle joint, exquisite tenderness under and to the medial side of the lateral malleous." "That she was wearing an ankle support at that time; that he saw the patient on February 2, 1959, when she injured her lumbar back when her right ankle gave way; that she was confined to bed."

"There was limitation of the spine in extension, flexion, lateral and rotary motion; they were all limited and painful. There was also paraspinal lumbar muscle spasm"; that he continued to treat her until October, 1959, when he referred her to Dr. Ammerman (Tr. 444-448). (J.A. 66-71)

Thereupon Dr. Lee testified that he saw Mrs. Buggs immediately after her fall on February 1, 1959. That she was lying on the couch in her living room and the patient was complaining of excruciating pain both in the lower portion of her back and the lower extremities; that he administered some parathon, with a small amount of codein, and an injection of demerol. That thereafter he admitted her to Freedman's Hospital on September 22, 1963, after a fall at 11:45 A.M. of said date. That the hospital record showed (Tr. 466):

> "Diagnostic impression: (1) There is a concussion, moderate without focal neurological sign; (2) sprain severe left sacro-iliac joint; (3) general body contusions.
>
> "Suggest: (1) neurosurgical consultation prior to movement from bed board; (2) x-rays as indicated; (3) sedation; (4) symptomatic therapy.
>
> "The next date is 9-23-63.
>
> "Q. These are still in your own writing?
>
> "A. My own writing. "(Reading)
>
> "Patient is doing well on second day. Has residual discomfort in low back, dull headache, no change in neurological findings. Physical medical consultation is being ordered.

"The next date in my writing is 9-26-63.

"Patient is doing quite well on 4th and 5th hospital day. Has shown marked improvement. Still has sensory level near level of knee, right. Discomfort in both sacro-iliac areas and associated muscle spasm has decreased particularly on the left. Residual muscle spasm and deep seated soreness remains on the right.

"Dr. Ammerman is to see patient at office. Patient will be discharged today. Refer to Dr. Ammerman for continued observation. Headaches still persist."

Dr. Lee stated that the reason for the pain which she suffered in those regions was due to the fall (Tr. 467). (J.A. 72-75)

Thereupon, Dr. Ammerman was sworn and testified that the fall caused the herniated disk (Tr. 491). That the numbness in the great toe could have been caused by either the ruptured disk or local injury. That the weakness in the dorsal flexion was diagnostically helpful; that it was his opinion that the weakness in the dorsal flexion resulted from the rupture of the vertebral disk, because on the basis of the history she developed the foot drop following the time she fell and twisted her back (Tr. 501, 502). (J.A. 83) That the foot drop was present in the examination so it would have to precede the *diskotomy*. That the last time he saw the patient she had some anesthesias or hypoesthesias over the lateral aspect of the right foot, and considerable loss of sensation over the medial aspect, the inside of the right foot, as of October 1, 1963 (Tr. 503). That these residuals are the result of the procedures which led to the laminectomy (Tr. 504). (J.A. 75-86)

On cross-examination, Dr. Ammerman was of the opinion that the weakness in the dorsal flexion resulted from the rupture of the vertebral disk (Tr. 501). (J.A. 83) That his opinion in this respect had its basis in the history of the case, because Mrs. Buggs developed the foot drop following the time she fell and twisted her back (Tr. 502). (J.A. 83) That the right leg held residuals which make it function in an inefficient manner

compared with the normal lower extremity (Tr.506).(J.A.86) That those residuals are largely the consequence of the nerve root pathology that led to the laminectomy (Tr. 507). (J.A. 86)

At the conclusion of the evidence and the summation of counsel for the respective parties, the trial court proceeded to instruct the jury. The significant charges here involved and challenged by the appellant are (1) proximate cause and (2) contributory negligence.

On the issue of proximate cause the instruction of the trial court is as follows:

> "The burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence that the defendant was guilty of negligence and that such negligence was the proximate cause of the accident and of any damages which you may find the plaintiff has sustained.
>
> "By proximate cause, as that term is used in these instructions, is meant that cause which in natural and continuous sequence, unbroken by an efficient intervening cause produces a damage to the complaining party and without which the result would not have occurred.
>
> "It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury or injuries alleged. It may operate directly or by putting intervening agencies in motion. In connection with, and as a part of the Court's instructions on proximate cause, you are instructed that if the female plaintiff is entitled to recover any damages from the defendant, the amount of such damages must be limited to such injuries as have been shown by a preponderance of the evidence to have proximately resulted from the accident in the defendant's store on June 11, 1958.
>
> "In other words, you should not award the female plaintiff damages for any injuries which you find she has suffered after June 11, 1958, unless it has been shown by a preponderance of the evidence that those later injuries were proximately caused or proximately resulted from the accident on June 11, 1958."

The trial court gave the following instruction on the issue of contributory negligence:

"I have previously stated that I would instruct you on contributory negligence and I shall now do so.

"The definition of contributory negligence is the same as the definition of negligence as I have already given you that definition, except that contributory negligence is negligence on the part of the plaintiff rather than on the part of the defendant, as you have already been instructed.

"If you find that the defendant was not guilty of negligence your verdict will be for the defendant and in that event you will not be called upon to consider whether the female plaintiff was negligent. It is only in the event you find the defendant guilty of negligence that you will consider whether the female plaintiff was also guilty of contributory negligence.

"If you find from a preponderance of the evidence and under the Court's instructions that the defendant was at the time and place in question guilty of negligence as charged by plaintiff, yet if you further find from a preponderance of the evidence that the female plaintiff was also negligent, and that her negligence, if any, was the proximate cause of the accident resulting in injury, or that her negligence proximately contributed to cause the accident, causing injury, then in that event the female plaintiff would have been contributorily negligent.

"Accordingly, you are instructed if the defendant has not established such defense of contributory negligence of the female plaintiff by a preponderance of the evidence, and if you have found that the plaintiff has established negligence on the part of the defendant by a preponderance of the evidence, then your finding should be for the female plaintiff on the issue of contributory negligence.

"However, if the defendant has established said defense of contributory negligence of the female plaintiff by a preponderance of the evidence and if you find said contributory negligence was the proximate cause of the accident on June 11, 1958, or that her contributory negligence proximately contributed to cause the accident on that date, then your finding should be in favor of the defendant on the issue of contributory negligence.

"In connection with the defense of contributory negligence, you are instructed that the burden is on

the defendant to prove contributory negligence on the part of the female plaintiff by a preponderance of the evidence.

"You are instructed that if the evidence on the issue of contributory negligence by the female plaintiff preponderates in favor of the defendant, then and in that event contributory negligence on the part of the female plaintiff has been established.

"If the evidence is equally balanced or preponderates in favor of the female plaintiff on the issue of contributory negligence then you are instructed that said contributory negligence on the part of the female plaintiff has not been established.

"If you do find that the female plaintiff was contributorily negligent you are instructed that her contributory negligence would bar recovery by both plaintiffs.

"If it should appear to you from the evidence in this case that the conduct of the female plaintiff in this case amounted to contributory negligence, and, if you further find that such contributory negligence was the proximate cause of the accident on June 11, 1958, then in that event such conduct on the part of the plaintiff would constitute a bar to recovery by both plaintiffs and in that event your verdict should be for the defendant.

"It is for you the jury to determine the issues of negligence and contributory negligence from all the evidence and under the Court's instructions as to the law."

That thereupon the jury retired to consider their verdict and after considering same they found for the appellees and awarded the female appellee $9,000.00 and the male appellee $2,000.00.

That thereafter appellant filed in the court below its motion for Judgment N.O.V., for New Trial or For a Remittitur, supported by Memorandum and Supplementary Memorandum of Points and Authorities. Appellees responded by filing their Memorandum and Supplementary Memorandum of Points and Authorities in Opposition to said motion.

The above motion was argued at length by counsel for the respective parties and thereupon the trial court entered, on May 19, 1964, its order denying said motion. Judgments were accordingly entered on behalf of the appellees, and the appellant prosecutes this appeal from the entry of said judgments.

## SUMMARY OF ARGUMENT

### I

The appellant concedes that the female appellee suffered an injury to her right ankle and right foot at its Safeway Store on June 11, 1958, through the negligence of the appellant. The injury was diagnosed as a "traumatic hemo synovitis" of the right ankle. She was treated by Dr. Robinson until July 16, 1958, at which time she was discharged as improved, but still complaining of weakness in the right ankle. At the time of the discharge she was advised to continue the wearing of the ankle support.

The patient, while wearing her ankle support slipped and fell and re-injured her right ankle on September 1, 1958 while at home. This second injury was treated by Dr. Robinson and she was still under Dr. Robinson's care when she fell a third time at home further injuring her right ankle and low back on February 2, 1959. The third fall resulted in an operation by Dr. Ammerman for the removal of a ruptured disk. Dr. Ammerman testified that there was weakness of the dorsal reflexion of the right foot. Each of the falls sustained subsequent to June 11, 1958 is supported by an abundance of evidence that the weakness in the ankle was the proximate cause of the falls. These are confirmed by medical testimony and medical treatment. The jury found that the subsequent injuries were the proximate causation of the injury sustained on June 11, 1958.

II

There was adequate substantial evidence on the issues of causation and proximate connection between the fall of June 11, 1958 and September 1, 1958. This evidence likewise links the said injuries with the injuries resulting from the fall of February 2, 1959. The appellant offered no affirmative evidence in support of its claimed "intervening causes". The jury resolved the issues in favor of the appellees. Indeed there was no evidence that the injuries sustained by the female appellee occurred in a way or manner different from that stated by the female appellee. Moreover, the history taken by Dr. Murphy, an expert medical witness, appearing for the appellant, in his examination of the female appellee on January 20, 1964, corroborates the testimony of said appellee and the history she gave the other attending physicians.

III

The jury was fully and fairly instructed in the case. There was nothing said to the jury in the instructions given them that would tend to mislead them, either as to the law or as to the facts. The requested instructions of the appellant which were denied did not correctly state the applicable law.

## ARGUMENT

I

### A. The Record Considered as a Whole Discloses Substantial Evidence of Causation Among Original And Subsequent Injuries

It is apparent from a cursory analysis of Appellant's "Statement of the Case" that the appeal herein "will concern itself solely with the manner in which the trial court dealt with the Plaintiffs' damage claims for alleged consequential injuries" (Appellant's Brief, I). In the light of the foregoing, appellees' argument shall be confined to the question of

causation and its relation to the consequential injuries of the female appellee.

Appellant's Brief (p. 1) charges that Dr. Robinson was not asked to express an opinion "as to whether the fall of September, 1958, was the result of any injury or residual disability sustained in the Safeway Store incident of June 11, 1958. Nor was he asked to express an opinion as to whether the fall of February, 1959 was the result of any disability sustained in either June or September, 1958." It is evident that Dr. Robinson obtained a history from Mrs. Buggs on June 16, 1959, in which it was disclosed that she injured her right ankle in a Safeway Store on June 11, 1958, when she struck it against a platform in the aisle, and she fell to the floor. That she had treated her ankle at home but it had gotten no better. That she struck her knee at the same time, but that was giving her no trouble at the time. With the foregoing history Dr. Robinson made an examination of Mrs. Buggs (Tr. 440-441) (J.A. 66-70) After the examination Dr. Robinson treated the ankle. He "applied ethyl chloride spray and strapped it with an ace bandage and ordered crutches" (Tr. 441).

It was a "gelo" cast that Dr. Robinson placed on the right foot of Mrs. Buggs which remained until July 11, 1958. The said cast was removed on said date. The doctor stated: "At that time the swelling had subsided and we ordered hydrotherapy treatments; that is physiotherapy and the whirlpool, and ordered an ankle support" (Tr. 441-442). Dr. Robinson further testified that "on the 16th of July, 1958, Mrs. Buggs stated that the foot and ankle feel fine but the ankle was weak." "She was advised to continue the wearing of the ankle support. We discharged her on the 16th day of July, 1958."

It may be observed that during the above described period Dr. Robinson saw Mrs. Buggs on June 16, 17, 18, 19, 20, 23, 26, 30 and July 11 and 16, 1958.

The above described factors demonstrate the quality and quantity of knowledge possessed by Dr. Robinson of the sprained right ankle and leg of Mrs. Buggs at the time he examined these members on September 10, 1958. On the latter date, Mrs. Buggs informed Dr. Robinson that on September 1, 1958, "she reinjured her ankle when it gave away on her. It began to swell. The pain was in the region of the anterior tibial tendon over the joint space". "The pain radiated to the knee" (Tr. 443).

On the said occasion of September, 10, 1958, Dr. Robinson's "examination revealed swelling about the ankle joint, with exquisite tenderness under and to the medial side of the lateral malleous. The lateral malleous is the outside of the leg, the small bone here called the fibula; on the outer side" (Tr. 443). Dr. Robinson further testified in respect to his examination of September 10, 1958, that "At that time she was wearing an ankle support and we started her on ultrasound treatment. This is a form of physiotherapy" (Tr. 444). In relation to the reinjury of September 1, 1958, Dr. Robinson saw Mrs. Buggs six times (Tr. 452).

That on September 25, 1958, Dr. Robinson discharged Mrs. Buggs as much improved, "except for weakness of the ankle" (Tr. 452). That at the time she reinjured her right ankle on September 1, 1958, she was following the instruction of her physician by wearing the ankle support.

The evidence, therefore, developed from the injuries of June 11, 1958 and September 1, 1958, has support in the sworn testimony of Dr. Robinson of a "weak ankle". This evidence further demonstrates that it formed the basis of Dr. Robinson's diagnosis and treatment. Treatment of a weak right ankle with "swelling about the ankle joint, with exquisite tenderness under and to the medial side of the lateral malleous."

This, then, was the posture of the evidence of the first and second injuries when Dr. Robinson saw Mrs. Buggs on February 2, 1959.

On this occasion Mrs. Buggs stated that "the night before her right ankle gave away on her and she slipped and experienced a sudden

pain in the lumbar back." That on this occasion, she was given emergency treatment by Dr. Lee. That the patient was confined to bed and upon examination he found that "there was limitation of motion of the spine in extension, flexion, lateral and rotary motion." That "they were all limited and painful. There was also paraspinal lumbar muscle spasm" (Tr. 445). That he saw Mrs. Buggs again on February 18, 1959, at which time she said she had been in bed since February 2, 1959; that she complained of pain radiating to the leg (Tr. 446). That he treated the patient until October, 1959, at which time he referred the patient to Dr. Harvey Ammerman, a neurosurgeon, "because of the continuing disability of her back and leg and she was getting a weakness in the big toe of that leg which indicated to us that it was probably a ruptured disk that she had, and that falls in the province of a neurosurgeon" (Tr. 447). The sworn testimony of Dr. Robinson as detailed above was direct testimony. No opinion of Dr. Robinson was essential to a description of the pathological condition of the patient's right ankle and leg which gave rise to the constant weakness therein. It is obvious to the layman that the weakness was a natural consequence of the sprained right ankle demonstrated and corroborated by the above testimony of Dr. Robinson, coupled with the history obtained from Mrs. Buggs. Neither was it necessary to exact from Dr. Robinson an opinion "as to whether the fall of September, 1958, was the result of any injury or residual disability sustained in the Safeway Store incident of June 11, 1958", when Dr. Robinson's history of those two falls clearly showed the causal relation and his treatments proceeded on this basis. Likewise the injury of February 2, 1959, contained a cognate history. It is conceded that Dr. Robinson expressed the opinion "that Mrs. Buggs probably suffered a disk herniation in the incident of February, 1959." It is further conceded in Appellant's Brief that Dr. Ammerman detailed several residual findings about which he expressed the opinion that they were the result of the nerve root pathology arising from the fall."

Apart from the foregoing concession by the Appellant, the examination of Dr. Ammerman on "the straight leg twisting test" stated that "if there is pressure on the nerve root, the patient then as you start to raise the leg up you stretch the nerve root across the low back, whatever is giving, causing the pressure, and that causes pain to run out the leg, and that was present on the right and not on the left." That "there was marked tenderness over the lateral aspect of the right foot and hypothesis over the medial aspect of the right leg and foot" (Tr. 476-477). (J.A. 75-86)

It is significant that the above testimony of Dr. Ammerman is not only premised on his own examination, diagnosis and treatment of the patient, but also includes the following history of the patient:

> "The history revealed, based on the patient's history she gave me, that she injured herself on June 11, 1958, when, in a Safeway Store, she caught her foot on a projection and was thrown forward. As a result of this injury, she injured her right ankle and right foot. This was followed by severe pain in the top of the right foot together with numbness in the right great toe. As her pain persisted, she came under the care of Dr. Robinson, orthopedic surgeon, who subsequently referred her to me, and he treated her" (Tr. 475). (J.A. 76)

That "this injury occurred in 1958, and beginning about 1959, the history I have, the patient's right foot gave way and she twisted her back. This was followed by the persistence of low back pain together with radiation of the pain down into the right leg and foot. She then developed a foot drop" (Tr. 475). (J.A. 76) Again in referring to the history given him by Mrs. Buggs, Dr. Ammerman testified that: "And then she subsequently—her foot gave way or she fell or tripped—something occurred because of the weakness of the foot, and then she twisted her back, and then she got a ruptured disk in her back" (Tr. 483).

In addition to the above, Dr. Ammerman in his testimony made a sketch of the injuries sustained by Mrs. Buggs on June 11, 1958. He sketched and demonstrated and explained the injured areas of her ankle and upper part of the foot. He stated (sketching on the board): "This

area was injured in the right foot. Following it she had pain in this area" (indicating on sketch on board) (Tr. 483).

Appellant's Brief is critical of the failure to propound questions to Dr. Robinson seeking to ascertain causal connections in respect to the original and subsequent falls and injuries of Mrs. Buggs, and likewise of the limited extent to which the opinion of Dr. Ammerman covered those issues. The record discloses, however, that when counsel for appellees (who was not counsel of record when the pre-trial order was entered), sought to explore these areas, he was met with strenuous objections from counsel for appellant. In furtherance of this matter, the following occurred during the direct examination of Dr. Ammerman by Mr. Lawson:

> "Mr. Lawson: Doctor, in your opinion, what caused Mrs. Buggs to fall?
>
> "Mr. Connolly: I object to this, if the court pleases. He wasn't there. He did not see it happen.
>
> "Mr. Lawson: I asked his opinion.
>
> "Mr. Connolly: You don't have medical witnesses to state opinions" (Tr. 484).
>
> "Mr. Lawson: That may be, but I have a right to ask him, and I ask the court to rule. What, in his opinion, caused these falls?
>
> "Now the Plaintiff testified she twisted her foot or ankle as a result of weakness in the foot. The doctor testified as to this weakness. I think it is proper for me to ask him that question" (Tr. 486).

It is clear from the foregoing that counsel sought to establish through Dr. Ammerman the cause of the subsequent falls and their causal relation to the original fall. To this counsel for appellant objected. Thus the appellant now urges upon this Court the very issue to which it objected in the court below (Tr. 486). Moreover, appellant advocated during the trial below that "the question of what caused her to fall is for the jury to decide under all the facts and circumstances" (Tr. 487). Appellant protested vigorously when counsel for Appellees sought to elicit an opinion from Dr. Lee, the association of the pain suffered by Mrs.

Buggs in those regions with the falls sustained by her (Tr. 467). The present position of appellant is at least inconsistent.

The issues of causal relations were submitted to the jury, as suggested by appellant below, and the jury answered these issues in the affirmative. The jury, following the instructions given them by the trial court, have resolved all factual evidence in favor of the appellees. The appellant, therefore, presents to this Court, solely, questions of law.

## B. Appellant Was Not Then, and Is Not Now, Entitled to a Directed Verdict on the Issues Of Subsequent Injuries.

If the appellant is to prevail in this Court, it must now show that "there was no evidence sufficient for the jury upon the issue of responsibility for the second and third falls." Unlike the defendant in *S. S. Kresge Co. v. Kenny,* 66 App. D.C. 274, 86 F.2d 651, the appellant herein did not ask for peremptory instruction on such issue in the trial court. It is in effect asserted in this Court for the first time. In the *S. S. Kresge Co.* case, *supra,* the lower court instructed the jury as follows:

> "You are also instructed if your verdict is for the plaintiff and if you further find from the evidence that the plaintiff acted as an ordinary and reasonable person on the night of October 3, 1934, in trying to get a drink of water and that while so doing she was caused to fall as a direct result of a weakness or physical instability produced by the injuries which she sustained on December 13, 1933, in the defendant's store, then you are instructed that she is entitled to recover for the injuries sustained by the fall on October 3, 1934, in addition to the injuries sustained on December 13, 1933."

This Court said: "The law embodied in the instruction given was correct." This Court further stated in the above case that "the law holds responsible in damages one whose negligent act is the proximate cause of injury to another. The proximate cause of an injury is that cause which, in natural and continuous sequence unbroken by any efficient,

intervening cause, produces the injury and without which the result would not have occurred." It is implicit in the judgment below that the jury found that Mrs. Buggs was not guilty of contributory negligence, that the fall of September 1, 1958 was proximately related to the injury sustained in the fall of June 11, 1958, and that the fall of February 2, 1959, was the proximate result of the said two previous falls. Appellant concedes that there was negligence attending the fall of June 11, 1958, and it must further concede as a matter of law that, unless the record considered as a whole shows that Mrs. Buggs was negligent in sustaining these subsequent falls, the judgment must be affirmed.

This is true under the doctrine laid down by the Supreme Court of the United States in the case of *Slocum v. New York Life Insurance Co.*, 228 U.S. 364. There it was held that under the Seventh Amendment to the Federal Constitution, any attempt to re-examine a Jury verdict in a civil case is subject to the Rules of the Common Law of England. That neither the trial court nor the appellate court possesses the powers to reverse a jury verdict on substantial factual issues. What then were the substantial factual issues? What then were the substantial facts considered and decided by the jury in the trial below? In addition to the medical testimony given at the trial by Doctors Robinson, Lee and Ammerman enumerated above, we have the testimony of Mrs. Buggs herself, the person who sustained these injuries and who underwent the suffering therefrom. Testifying as to the injuries sustained on June 11, 1958, she said:

> "My foot hit under this platform hurting – and I fell over on it. I had a cut on my knee and a cut on the instep" (Tr. 173).
>
> "When I got home, my foot was in pain. The swelling had started in my ankle. I soaked it in lukewarm water and Epson salts for about fifteen or twenty minutes. Then I stretched out, continued to stretch out on the sofa. I finally hobbled upstairs and got into bed. When my husband came, we soaked it again and there I remained until the next morning. The next morning I could not put my foot on the floor. It was swollen and very painful. I stayed in bed all day. About 7:00 or 8:00 o'clock that Thursday night I called our family

> physician who is Dr. Spellman. He advised me to see an orthopedic surgeon if I continue to have trouble. At that time Dr. Robinson's office was closed. I guess it was closed, but anyway I didn't call him until the next morning which was Friday – and made an appointment. He could not see me until the 16th, but he advised me what to do. That was Monday the 16th when I went to his office. He examined my foot and made X-ray and gave me treatments, ultrasonic treatment, hydrotherapy after which he taped my ankle and told me to get some crutches" (Tr. 174-175).
>
> "For a month or better I went regularly for treatments, ultrasonic and hydrotherapy treatments. During the period of the month, he put a cast on my foot up to my knee, which I wore for about two weeks. Then I was discharged as improved, but still had the pain. Whenever I would try to place my foot or walk on it, I would get pain in it, and the swelling was still, but not as severe in my foot" (Tr. 175).

The above testimony demonstrates traumatic injuries accompanied by swelling and severe tenderness and pain to the injured areas. This evidence shows more than subjective symptoms as argued by the appellant.

Testifying as to her second fall, the injury of September 1, 1958, Mrs. Buggs states:

> "Over the period of the month, I suffered greatly, and after about seven weeks, seeing him at intervals, I twisted my ankle. My foot gave way, which was very weak, and I twisted my ankle. I had to go back for more treatments. Over a period of about three and a half months I received treatments at intervals" (Tr. 175).

Testifying as to the fall and injuries of February 2, 1959, Mrs. Buggs said:

> "I was walking across the floor. My foot gave way and I twisted my ankle. Again trying to keep from falling to the floor, I twisted my back. I sat down in the chair and after I got my composure, I called a neighbor, a Dr. Lee, a physician. He came to my rescue and prescribed – he examined me and prescribed some medicine. - - - The next morning I called Dr. Robinson, who was still treating me for my ankle. He came by the house

> and he examined me. He told me to put a board under the mattress, and when I felt better or could walk a little better, or could walk a little, to come to the office for a thorough examination" (Tr. 176).

The above testimony covers the three falls and clearly shows the causal relations among the three falls.

Significantly, Mrs. Buggs gave a similar history to Dr. James Peter Murphy, appellant's witness, when he examined her on January 20, 1964 (Tr. 507-19, 507-20). Indeed the testimony of Dr. James Peter Murphy made reference to the diagnosis of Dr. Robinson as to the injury of June 11, 1958. Dr. Murphy states that: "She was treated then by Dr. Henry S. Robinson, whose report reflected that he treated a – traumatic hemo synovitis of the right ankle – and he discharged her on July 16, 1958, as improved" (Tr. 507-22).

The posture then of the first fall was clearly inflammation of the synovial membranes of the right ankle. We are advised by an eminent authority on legal anatomy that:

> "The synovial membrane is a thin but strong tissue which forms a lining or a covering between the ligaments and bones of the ankle joint. It is attached in such a manner that it forms a flattened sac or pouch which extends in and out between the structures which form the joint. This thin closed sac holds synovia, a substance like the white of an egg, by virtue of which the sac with its contents acts as a pad between bones and as a fluid for lubricating the joint. It contains more synovia to moisten the inner side of the sac and thus permits those surfaces to move freely about upon one another as occasions demand. Sprains of the ankle not only produce a tear in the ligaments, but the synovial sheaths or membranes are apt to be torn and damaged at the same time. It should be noted that injury of the synovial membrane, followed by inflammation, to a great extent, account for the long, continued disability of a sprained ankle." *Legal Anatomy and Surgery, Malloy,* Pages 286, 287.

The foregoing best illustrates the extent of the ankle sprain suffered by Mrs. Buggs on June 11, 1958. The second fall gave rise to

swelling and the pain was in the region of the anterior tibial tendon over the joint space; the pain radiated to the knee (Tr. 443). In fact the examination revealed swelling about the ankle joint with tenderness under and to the medial side of the lateral malleous (Tr. 443). This second injury of September 1, 1958 shows an aggravation of the pre-existing injury of June 11, 1958. With the "medical" and "lay" evidence described herein before, a further analysis from "Malloy on Legal Anatomy" becomes more apparent. At page 285 of his work, the author states:

> "The three bones that enter into the formation of the ankle joint are the tibia and fibula and the ankle bone. It has been explained that the tibia and fibula articulate with one another (joint) close to their lower ends and form an arch or saddle which rests upon the ankle bone. The stubby and curved processes or projections on the lower end of each leg bone (internal and external malleous) hang partly over the side of the ankle-bone."

The connections of the fibia, fibula and ankle-bone, having their basis in the ankle itself, destroys the thinking that, as a matter of law, they have no proximate relation which a jury may find. In declaring causal relation between a pre-existing illness and a subsequent aggravation thereof, this Court held in *Robinson v. Bradshaw,* 92 U.S. App. D.C. 216, 206 F.2d 435, that:

> "There was testimony that deceased should have been institutionalized for examination as to some involvement of the central nervous system due to illness; that on the date of his death he was agitated, fearful and confused; that he had been on a sixteen hour tour of work 'a long trip' – having reported at 8:00 A.M. and returned after midnight; that on a previous day, he had told another about threats against him; that he had been told to take the truck back to Washington or it would be too bad for him. * * * Even if the evidence standing alone did not necessitate a finding of aggravation, the underlying illness attributable to the employment, the statute itself, in the state of the evidence, required a conclusion to that effect. It is held, as we have seen, that when death in the course of employment results from an aggravation caused by the employment of a pre-existing illness, it is compensable under the statute."

It may be noted in the above case there was no medical evidence of aggravation on its causal connection with the pre-existing illness. This Court found such evidence from the record as a whole.

The evidence as to the third fall, the fall of February 2, 1959, discloses that there was also a medical finding of limitation of motion of the spine in extension, flexion, lateral and rotary motion. They were all limited and painful. That there was also para-spinal lumbar muscle spasm (Tr. 445).

Further medical evidence related to the fall of February 2, 1959, as given by Dr. Lee shows that his examination revealed a contused area of the occipital area of the scalp, with slight hematoma formation, marked tenderness noted at the left sacro-iliac joint and opposite the fourth and fifth (lumbar) vertebra, the right lower extremity revealed hypoesthesis from the knee downward (Tr. 465). Indeed when Dr. Lee was asked: "Do you know the reason for the pain which she suffered in those regions?" his answer was: "I thought they were the result of her fall" (Tr. 467). The above is corroborated by Dr. Ammerman (Tr. 477). The record further shows that Dr. Ammerman translated the ankle and foot injuries of June 11, 1958 by his sketches on the board (Tr. 483). Mrs. Buggs' testimony, as to the cause of her falls and accompanying injuries, is fully corroborated by Dr. Ammerman for he found where she said she was hurt, tenderness and pain at such locations (Tr. 484). Mrs. Buggs' testimony is again corroborated by Dr. Ammerman. When speaking of the fall of February 2, 1959, he said:

> "The patient's right foot gave way as a result of which she fell, twisting her back and this was followed by the persistence of low back pain, together with radiation into the right lower extremity and foot. Patient also developed a foot drop after this difficulty in January or February 1959. That is my note" (Tr. 490).

When asked his opinion on cross-examination whether "the weakness in the dorsal flexion resulted from the vertebral disk?", Dr. Ammerman replied: "Well, on the basis of the history, yes. Because she developed

the foot drop following the time she fell and twisted her back" (Tr. 502).

Again we find Dr. Ammerman responding to an opinion question on cross-examination which disclosed that the "anesthesis or hypothesia over the lateral aspect of the right, and considerable loss of sensation over the medial aspect, the inside of the foot, resulted from the *procedures* which led to the laminectomy (Tr. 503-504).

Appellant argues in its Brief that the opinion as effected above dates back no further than February 2, 1959. This, however, does not reveal a true reflection of the force of Dr. Ammerman's said opinion in reply to a question propounded to him on cross-examination by appellant's counsel. His opinion in this respect clearly covered the "procedures which led to the *laminectomy*."

There was no instruction offered by appellant to limit this opinion in relation – back to February 2, 1959. Neither was the opinion given any such limitation by the lower court's instruction to the jury. The record as a whole, therefore, demonstrates beyond question that there was abundant evidence, both "medical" and "lay" to establish proximate cause among the several injuries sustained by the female appellee. This being true, there is no merit to the argument of appellant that there was no substantial evidence of proximate cause of subsequent injuries for submission to the jury.

### C. The Evidence of Mrs. Buggs, alone, on the Issue of Proximate Cause of Subsequent Injuries Was Sufficiently Adequate.

The overwhelming weight of American authorities have held and are continuing to hold that:

> "One who has received a personal injury as a result of another, can recover all damages proximately traceable to the primary negligence, including subsequent aggravations, the probability of which the law regards as a sequence and natural result likely to flow from the original injury. Generally speaking, if the

> injured person conducts himself as would a reasonably prudent person in his situation and circumstances, but by his subsequent conduct innocently aggravates the harmful effects of the original injury, whatever damages may be attributed to such aggravation of the injury is considered the proximate result of the original injury and recoverable as a part of damages therefor." *15 Am. Jur. 492*, Sec. 83, Damages.

Likewise the law is well settled to the effect that laymen may testify to such matters as are within common knowledge and experience. This question was presented to the New York Court of Appeals for determination in the case of *Meiselman v. Crown Height Hospital,* 285 N.Y. 389, 34 N.E. 2d 367, and there discussed at length. In the course of its opinion, the New York Court of Appeals said:

> "Common sense and ordinary experience and knowledge, such as is possessed by laymen without the aid of medical expert evidence, might properly have suggested to the jury that the condition of the boy at the time that he was left without hospitalization and abandoned by the defendant was not compatible with skillful treatment. Ordinarily, expert medical opinion evidence, based on suitable hypotheses, is required when the subject matter inquired about is presumed not being within common knowledge and experience, and when legal inferences predominate over statement of fact, to furnish the basis for a determination by a jury of unskillful practice and medical treatment by physician, but where the matters are within the experience and observation of the ordinary jury-man from which they may draw their own conclusion and the facts are of such nature as to require no special knowledge or skill, the opinion of experts is unnecessary."

In light of the above decision of the high Court of New York, the natural inquiry is inevitable, what layman or juryman is without knowledge or experience of a sprained ankle or a weak foot, resulting from a fall or other sources? The probability is that the sufferer from a sprained ankle and the resulting weakness has far more knowledge of the physical pain and mental anguish, than the educated guess of the experts.

In its Brief, appellant quotes at length from the case of *Wilhelm v. State Traffic Safety Comm.*, 230 Md. 91, 185 A.2d 715, 719 (1962). It is quite evident from the quoted portion of the opinion of the Maryland Court of Appeals that the said quote does not fully represent that Court's thinking on this question. For we find at page 103 of the State report and page 721 of the National Report, that the Court said:

> "Mrs. Wilhelm testified that when the automobile in which she was seated, was struck by the vehicle operated by the appellee, she was thrown forward and her head hit the sun visor, causing a 'big bruise', which did not disappear for some three or four months. She noticed that the skin of her face and her eyebrow turned white at the location of the bruise. She called this to Dr. Fisher's attention on June 25 (1959). Dr. Fisher confirmed this fact, and he and Dr. Jones confirmed the loss of pigmentation in the area. Mrs. Wilhelm further stated that she had had no 'white' condition on her face prior to the accident and there was no other 'white' pigment on her face other than in the area of the bruises. Mrs. Wilhelm contends that this depigmentation was an injury for which she was entitled to be compensated, and the testimony above related was sufficient to show a strong probability that it resulted from the accident. Hence, the question of causal connection should have been submitted to the jury. The Appellee counters by claiming that the submission of the question of causation to the jury would have invited conjecture and speculation. That the nature of this alleged injury was such that its cause had to be established by expert medical testimony and none other would suffice."

The opinion further observed and held that:

> "We think the question here involved comes within the category of the cases first mentioned under heading II. Where a woman 30 years old who had never had any previous depigmentation of the skin of her face, is shown to have suffered a bruise to her face on May 2 (1959) and within a few weeks thereafter a depigmentation develops, which is reported to and confirmed by the doctor on June 23 (1959) and the loss of pigmentation is confined solely to the area of the lesion, common experience, knowledge and observation of laymen, we

> think would permit a rational inference that the bruise had probably caused the loss of pigmentation in the absence of any other equally probable cause. This with the other evidence in the case was all that was necessary to make out a prima facie case on the issue here being considered."

The said quoted part of the decision of the Maryland Court of Appeals, appearing in appellant's Brief, is fully explicated by the opinion of said court preceding said "quote". There the Court was dealing with the following instructions given by the trial court:

> "The trial court instructed the jury that there was no legally sufficient evidence to show (a) that the wife's alleged 'psychiatric involvement, psychosomatic factors or mental state', or (b) that abdominal or back pains associated with her menses, were the result of the accident of May 2, 1959; consequently the jury was not to consider these factors in estimating damages."

The said opinion of the Maryland Court of Appeals upheld the ruling of the trial court in the foregoing charge to the jury because medical evidence was required to show the causal connection and there was a total absence of any such medical evidence. It must be conceded that a purely medical question was presented by the evidence above and wholly distinguishable from the issues presented on this appeal by the appellant.

The analogy, however, is presented by the relation between Mrs. Wilhelm's injury of May 2, 1959 and subsequent development of depigmentation of the skin in the area of the involved lesion. There the Court held that Mrs. Wilhelm's testimony was sufficient to establish a *prima facie* case of causal connection between the injury of May 2, 1959 and the subsequent depigmentation.

In the instant appeal, Mrs. Buggs has testified fully as to her fall of September 1, 1958. She relates it back to the injury she sustained in the fall of June 11, 1958 (where appellant concedes negligence). This is corroborated by Dr. Robinson, as stated, *supra*, Mrs. Buggs also fully testified as to the relation of the fall of February 2, 1959, to the two

prior falls. This was confirmed by Doctors Robinson, Lee and Ammerman, as stated, *supra.*

In furtherance of this legal question we find the following support from *65 C.J.S. 1096, Sec. 244, Negligence:*

> "The causal relation between defendant's negligence and plaintiff's injury need not necessarily be proved by expert testimony where the cause of the injury relates to matters which are of common experience, observation or knowledge, the introduction of expert testimony is unnecessary. Medical testimony is not necessary to prove the causal connection where the connection is clearly apparent from the illness and the circumstances attending it."

Indeed, it was apparent from all of the falls suffered by Mrs. Buggs that there was swelling of the ankle together with other consequences, all of which were confirmed by the doctors.

The Supreme Court of Rhode Island likewise supports the views expressed above. Thus, in the case of *Valente v. Bourne Mills*, 77 R.I. 274, 75 A.2d 191, where a woman received a blow from a wooden and metal instrument on the nipple of her breast. She felt no particular pain and,therefore, did not report the accident. However, in about two weeks she observed that the nipple was "a little hard, and that pus was coming off". She went to the doctor, who, after examination, told her she must go to the hospital immediately. She went, and, in a few days' time, the doctor removed her entire left breast. The Trial Justice ruled against the petitioner upon the ground that she had failed to produce direct medical testimony expressly establishing a causal connection between the accident and the necessity of removing the breast. In a carefully considered and well reasoned opinion, the appellate court of Rhode Island reversed the judgment of the Trial Justice, and in so doing said:

> "We concede that in the great majority of the cases such testimony (testimony of experts) ordinarily is necessary because of the seeming absence of connection between a particular accident and a claimed resulting injury. But in other cases involving special

> and peculiar circumstances, medical evidence, although highly desirable, is not always essential for an injured employee to make out a prima facie case, especially if the testimony is adequate, undisputed and unimpeached. Thus, where, as in the instant case, injury appears in a bodily member reasonably soon after an accident, at the very place the force was applied and with symptoms observable to the ordinary person, there arises, in the absence of believed testimony to the contrary, a natural inference that the injury, whatever may be the medical name, was the result of the employment. Absolute certainty is not required in any case. If the reasonable probabilities flowing from the undisputed evidence discloses a progressive course of events beginning with the external accident in which each succeeding happening including the injury appears traceable to the one that preceded it, medical evidence is not essential for an injured employee to make out a prima facie case."

Here, the court tells us that "lay" testimony is competent to connect each preceding injury with each subsequent injury.

In the case of *O'Donnell v. Pennsylvania Railroad Co.*, 122 F. Supp. 899 (1954), decided by the United States District Court for the Southern District of New York, where Judge Edelstein, in denying a motion for new trial said, among other things, that:

> "Defendant railroad moves for a new trial in each of two separate causes trial under Federal Employers' Liability Act. The first cause of action went to the jury on damages only, liability being admitted. Serious back injury was testified to, but the errors alleged relate to two quite minor injuries also claimed, an elbow injury, and an injury to the inside of the left cheek. There was no doubt that the evidence on the elbow injury was inconsistent and the medical testimony was weak. But I am convinced that the evidence was sufficient to go to the jury for determination. The issue on the cheek injury is more troublesome, involving causal relationship. The plaintiff testified that he had a dental plate in his mouth which was broken, cutting his cheek. Subsequently, a lump in that area was surgically removed. *No medical testimony was offered connecting the accident with the lump inside the cheek.*

> There is no quarrel with the doctrine that expert medical testimony on causation is unnecessary where the disability complained of is the natural result of trauma. The perplexing problem is whether the appearance of a lump inside that region is a natural phenomenon warranting an inference of causal relationship by the jury without the benefit of medical testimony. It is not completely analogous to the appearance of blood or a bruise or a broken bone after a blow. Nevertheless, though there may be valid differences of opinion, I am not convinced that the question is peculiarly one of medical involvement and the motion will be denied."

The decisions of the courts cited and quoted at length above, coupled with the evidence submitted to and determined by the jury below, characterize the validity and substantiality of such evidence.

In their determination, the jury below was not confined to the single factor of "weak ankle", but they were privileged to consider all of the surrounding circumstances, including the swelling of the ankle after each fall, and the confirmation by the three attending physicians, together with all of the reasonable inferences deducible therefrom.

## II

### A. It Is Implicit in the Jury Verdict That the Falls Subsequent to June 11, 1958, Were Proximately Caused by the Fall of June 11, 1958.

As stated at the outset in Argument I above, unless the appellant can show as a matter of law that there was no substantial evidence submitted to the jury on the issues of causal connection among the original and subsequent injuries, the judgment must be affirmed under the Seventh Amendment to the Federal Constitution as construed by the Supreme Court in the case of *Slocum v. New York Life Insurance Co.*, *supra*. Appellant now argues that the subsequent injuries sustained by the female appellee were occasioned by intervening causes. After citing and quoting excerpts

from the opinions of the courts of Michigan, Massachusetts and Minnesota, appellant discusses at length the decision of this Court in the case of *S. S. Kresge Co. v. Kenny, supra.* Again, it appears that appellant has failed to discuss the critical evidence that gave rise to this Court's holding, as a matter of law, that Mrs. Kenny was guilty of contributory negligence, which constituted an efficient, intervening cause and barred her right to recover for the second fall. It was the following medical evidence flowing from the patient's physician that motivated this Court's said holding:

> "Her attending physician: 'although there were continued applications of ordinary treatments, there was no response as to healing, in that there was no callous formation. The two bones (pubic fracture) were equally immobile, as at the time of the injury, and through the entire period (between the first and second fall), there was no evidence manifested of any regeneration of the bone structure or union of the fracture. * * * There was and remains instability. She never acquired that sense of equilibrium which was required for freedom of movement. Some motion could be obtained, but it was always with the feeling that comes from an insecure foundation.' The physician had informed the patient that she would have to remain an invalid. She frequently had to be assisted during the period. Plaintiff was unable to do anything during that period (first and second fall). At the time of the second fall, she could get around only with the help of the family. (The maid dressed her every day, and when she is up, the maid helped her.)"

The above testimony established the basis for the Court's ruling of contributory negligence as a matter of law. The opinion further held that in the absence of negligent conduct of the patient she may recover for subsequent injuries. The full language employed by this Court, after stating the Rule of Proximate Cause is as follows:

> "The application of these principles to situations where one injury alleged to have been caused by the negligence of another is succeeded by a further injury alleged to be the result of the first, the law regards negligence

> on the part of the injured person which contributes to the further injury, as an efficient, intervening cause, sufficient to break the chain of causation. *But where the injured person is free of negligence in sustaining the subsequent injuries, the chain of causation is unbroken and the injury is compensable."* (Italics supplied)

The language of this Court has established the law in this jurisdiction. It was this law that guided the trial court in the trial of the cause below and his instructions to the jury. The jury has found for the appellees. This verdict implies that Mrs. Buggs was "free of negligence in sustaining the subsequent injuries." This verdict therefore bars the instant argument of the appellant from its claim that the subsequent injuries constitute "efficient intervening causes."

The New York Court of Appeals supports the holding of this Court expressed in *S. S. Kresge Co. v. Kenny, supra.* Thus in the case of *Zipprich v. Smith Trucking Company,* 2 N.Y. 2d 176 (1956), the action was brought by a bus driver and the occupant of a parked car, for personal injuries sustained by them when a northbound tractor-truck, owned by the defendant, swerved across the highway and struck the southbound bus, causing the driver of the bus to be thrown out of the seat and forcing the said bus off the road and out of control, causing it to strike the rear of the parked automobile. In the bus driver's case, the evidence showed that the Court received medical evidence on behalf of the bus driver to the effect that he sustained injuries to the 5th lumbar disk of his spine causing changes in the disk and nerve root pressure, and causing limitation of motion of the back and spine and that the injury belonged in the classification of chronic lumbosacral injuries with serious disk involvement and possible herniation of the disk and that it was caused by the accident. The defendant truck owner objected to such testimony on the ground that it was speculative and inadmissible. In the other action, by the occupant of the parked car, *there was evidence that the accident had caused a weakness of his right ankle and a permanent 50% of the motion of the right arm and shoulder, and that such original injuries had*

*partially caused his fall and consequent fracture of his arm when walking to his physician's office for treatment, and that such additional injuries had connection with his subsequent bronchial pneumonia of both lobes and pulmonary embolism in one lung.* (Italics supplied) The jury found for the plaintiffs and the judgments were entered on the verdicts. Upon appeal, the New York Court of Appeals held that there was no reversible error. The Court said in the *Zipprich* case:

> "We find no reversible error was committed in the reception of the evidence of the disk and the continuancy of the disability. As Dean Green phrases it, there is a case for the jury unless it can be found, that there is no room for two reasonable inferences or that reasonable minds could not disagree about the matter. (*Green, Judge and Jury,* 389, 1930)."

The evidence in this record is sufficient to sustain the verdict. In the *Crewser* case, there was sufficient evidence to entitle the jury to find that plaintiff's original injuries were the proximate cause of the subsequent injuries sustained. Let us digress sufficiently to consider an admiralty case with facts similar to the instant case. Thus, in the case of *Sommerseth v. United States* (E.D. Pa.), 91 F. Supp. 457, the facts show that:

> "While the libellant was engaged in operating the starboard winch located 'aft' of the No. 3 main deck cargo hatch lowering a life boat into the No. 3 hold, he was struck on the left knee by a piece of 2 x 4 lumber, approximately 8 to 10 feet long which had slipped from the top of a wooden framework for a roof approximately 10 feet above the deck."

Immediately following the injury, libellant experienced pain on top of the left knee similar to that of a bruise. When he awakened the following morning, the knee joint had become tender and swollen and he limped to work, and then, for the first time reported the accident to his foreman. Upon examination, the X-ray showed no fracture or bone pathology of the left knee-joint, and he was given physiotherapy treatment and ointment dressing. The knee did not respond to treatment and the libellant was

furnished a pair of crutches at the clinic on August 23, 1948. On that day while returning to his home from the clinic, the libellant slipped and fell due to his unfamiliarity with the crutches and he injured his right knee. The following day, the right knee-joint was also tender and swollen. -- Both knee joints continued to pain the libellant and on August 28, 1948, the libellant called his family physician, who tentatively diagnosed the condition as a "fulminating osteomyelitis" and recommended hospitalization. By August 30, 1948, libellant was suffering from inflammation of the ankle joint, feet, shoulder and hip, in addition to the knees. The final diagnosis was rheumatic fever without carditis.

The Court found as follows:

> "I find that the injury sustained by the libellant from the fall of the timber on August 18, 1948 and from the subsequent fall on crutches were the precipitating factors and the exciting causes of the disability resulting from rheumatic fever."

It is clearly established from the above cited cases that "intervening efficient causes" are questions of fact for jury determination.

## B. Appellant's Cases Cited in Support of Its Argument II.

Appellant has cited three state cases in support of its Argument No. II. These cases are: Ault v. Kulper, 279 Mich. 1, 271 N.W. 530 (1937); Raymond v. City of Haverhill, 168 Mass. 382, 47 N.E. 101 (1897), and Sporne v. Kaline, 184 Minn. 89, 237 N.W. 841 (Not 247 N.W. 41, as cited by appellant).

In the Ault v. Kulper case, *supra*, appellant's quotation from said opinion gives the impression that such was the holding of the Court. As a matter of fact, the quoted language is only a statement of facts by the Court in considering the second error claimed. The Supreme Court of Michigan did hold as this Court held in *S. S. Kresge Co. v. Kenny*, *supra*, and in so holding quoted at length from its own decision in the case of

*Stahl v. Southern Michigan Railway Company,* 211 Mich. 350, 178 N.W. 710, 711, as follows:

> "Plaintiff was injured when alighting from an interurban car. She was carried to her sister's home, a physician was called and found no fractures. Plaintiff remained in bed for a few days and when partially recovered, and while packing her suit case, it fell against her and she fell to the floor striking the injured hip and fracturing the femur. The court said: 'If the suitcase injury was the result of the injuries she received in the Railway accident, and her own negligence did not contribute to it, she would be entitled to recover all of her damages against the defendant in this action.' This Rule is well stated in the recent case of *Smith v. Northern Pacific Railway Co.*, 79 Wash. 448, 140 P. 685 (quoting from the Washington case) . . ."

The Michigan court held as a result of its opinion, that:

> "We think there was no error in submitting the two special questions to the jury. The jury was instructed that they could award damages under the first question for the injury of July 19 without reference to the subsequent accident. We fail to see how the defendant was prejudiced by the special questions."

In Raymond v. City of Haverhill, *supra,* appellant's quotation from the decision of the Supreme Judicial Court of Massachusetts failed to include the following material portion of that Court's decision:

> "We do not mean to intimate that, if this were an action of tort for negligence at common law, and not under statutes, the injury received on October 9th could be considered as a natural and proximate result of the injury on June 18th."

In the Sporne v. Kaline case, *supra,* the Supreme Court of Minnesota held the same as this Court in the *S. S. Kresge Co. v. Kenny* case, *supra,* that it was negligence as a matter of law, on the part of the patient to attempt to descend the steps to the basement with a broken leg and his other conditions.

## C. State Cases Supporting Appellees' Judgment Below.

In the case of *Hartnett v. Tripp*, 231 Mass. 382, 121 N.E. 17, 18, the plaintiff has been in a hospital nine weeks to heal his femur, fractured by defendant's negligence, and had recovered so that with the aid of crutches he could move between his bed and a wheel chair, when in getting out of the chair one of his crutches slipped and he fell back in the chair re-fracturing the femur at the place of the original fracture. The Court in ruling that the question of proximate cause of the second injury was for the jury, said:

> "The second injury, caused by the slipping of the plaintiff's crutch, could have been found to have had a causal relation to the original injury for which the defendant would be liable. It does not appear that the plaintiff acted carelessly or improperly; he had so far recovered from his first injury that he was permitted to use crutches, although still being treated at the hospital in attempting to get out of the chair with the aid of his crutches, he was performing a natural and necessary act, which it could not be ruled was negligent or so distinct from his original injury as to be a separate and independent act."

The Supreme Court of Minnesota has held, in the case of *Hyvonen v. Heckor Iron Co.*, 103 Minn. 331, 115 N.W. 167, that where respondent's leg was broken as a result of the accident, and he was confined to his bed for a period of about seven weeks before the cast was taken off. Several weeks afterwards, he was able to walk out with the aid of crutches. He went to a boarding house for one night, and while walking with the aid of his crutches, back to the hospital, slipped and fell, breaking his leg over again in the same place. Appellant objected to any evidence concerning this second injury. The Court held that the objection was not well taken. The jury was instructed in arriving at the amount of damages, that the second break was in exactly the same place as the first, which indicated that it had not entirely healed, and that the second break was naturally caused by the imperfect condition resulting from the first. That it was

for the jury to say whether the second break was a direct result of the first.

The female appellee's accident of September 1, 1958, and February 2, 1959, followed a definite course of therapy. She was wearing her ankle support on each occasion and each subsequent accident is confirmed by physicians and medical treatments. Moreover, each of her subsequent injuries involved the identical area, the sprained ankle. The issues involved here in respect to the patient not being under medical treatment or care at the time she suffered subsequent injuries, were never raised in the trial court, and are raised for the first time in argument before this Court. This Court, in the *S. S. Kresge Co. v. Kenny* case, *supra*, in declaring that absent negligence on the part of one who has suffered an original injury may recover for subsequent injuries, made no condition that such subsequent injuries must be confined to a period of medical care and treatment. Indeed, the concluding words in the latter opinion of this Court state, after citing with approval *Stahl v. Southern Michigan Railway Co.* and others, *supra*, that:

> "the plaintiff's original injury was to the sciatic nerve. There were no fractures. Her second injury occurred while packing her suit case which fell against her so that she lost balance and fell to the floor fracturing her hip. It can hardly be called negligent for such person, without a fracture, to pack a suit case. (citing cases) . . . Where the plaintiff after substantial recovery from a fracture, but with the injured limb still weakened by the original injury received the second injury in an accident while riding in a buggy, it could not be held to be negligent, especially when horses and buggies were in common use, for a person convalescing from a fracture, to ride in a buggy, and there was no showing that the buggies were negligently driven."

The above decisions make it crystal clear that "intervening causes" are questions of fact for the determination of the jury. The jury has found against the presence of "intervening causes" in the instant case. That verdict is now protected by constitutional safeguards. The test to be applied in determining whether this Court, or any other courts, should upset that

finding and grant judgment notwithstanding the verdict is whether that verdict is so contrary to the weight of the evidence that no reasonable juror would have voted for it. Here twelve jurors voted for it. Under the circumstances of this case, I would not indict them all as "unreasonable." *Klein, etc. v. Price,* ___ U.S. App. D.C. ___, ___ F.2d ____, (No. 18,152, decided March 26, 1964), dissenting opinion of Wright, Circuit Judge.

> "And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn,* 327 U.S. 645, 653 (1946).

The position, therefore, taken by appellant in its Argument No. II is neither supported in fact nor in law.

## III

### The Trial Court Adequately and Correctly Instructed The Jury on the Law of Responsibility for Subsequently Incurred Injuries.

It is here argued by the appellant that, at the conclusion of the plaintiffs' case in chief, he moved the court for a directed verdict because there was inadequate proof of causation to permit the jury to relate subsequent injuries and damage to the store episode of June 11, 1958. The record shows (Tr. 507-512) that appellant moved the court for a directed verdict on the ground of the absence of negligence, and on the further ground of the plaintiff's contributory negligence. Appellant also moved the trial court for a directed verdict on the ground "that the only testimony as to liability and proximate causation of injury or damages, comes from the plaintiff, whose testimony is so contradictory, confused and impeached as to be not worthy of credit, and is not of substantial character" (Tr. 507-514). The record does not show, and appellant does not contend, that the above motions were renewed at the conclusion of all the evidence.

Under the circumstances the law holds that such failure of renewal at the conclusion of all of the evidence constitutes a waiver thereof. The appellate court of Illinois in a discussion of this point in the case of *Haut v. Kleene, et al.*, 320 Ill. 273, 50 N.E. 2d 855, 856, said:

> "In 'Popadowski v. Bergaman', 304 Ill. App. 422, 26 N.E. 2d 722, we spelled out the Rule of Practice in such case and held that where defendant made a motion at the close of plaintiff's evidence, the motion could not be reserved if defendant put in any evidence and that motion could not be renewed at the close of all the evidence but a second motion must be made based on all the evidence. We there said: 'Where a defendant makes a motion at the close of plaintiff's case for a directed verdict, he must make a second motion, if he desires to save his point'."

Appellant states that it requested the trial court to instruct the jury "precisely and in detail with respect to the necessary findings necessary to establish proximate causation with respect to after incurred injuries, * * *." And the trial court refused to do so. Appellant was probably referring to defendant's requested instruction No. 5. For convenience, we set out said prayer No. 5, as follows:

> "You are instructed that if you find that the defendant was negligent under the instructions I have given you and that the female plaintiff was not guilty of contributory negligence, you should award damages, in accordance with the rules which I will hereinafter express, for those injuries and damages which were proximately caused by the defendant's negligence.
>
> "In this case it is claimed that the plaintiff suffered a swollen ankle on account of her fall in a Safeway Store on June 11, 1958, from which she was partially incapacitated for approximately a month and required during that period of time some medical care.
>
> "An unusual feature of the present case is that the plaintiff's claim for physical injuries and physical disabilities which occurred thereafter. It is contended that she reinjured her ankle in September of 1958 and was disabled for a time and required medical treatment. It is contended that an occurrence took place in her home in February of 1959, at which time she wrenched her back; was disabled for a time and confined to bed

and required additional medical care; that thereafter, due to persistent symptoms referable to her low back, she required an operation and was disabled on that account; required medical care and incurred hospital expenses. It is further contended that she was again to be hospitalized in September of 1963 for several days for head and back injuries.

"Now with respect to each complaint occurring beginning in February of 1958, before any damages may be awarded to either of the plaintiffs on account of such complaints or disabilities, you must be satisfied that each such complaint, disability or expense considered by you in fixing the amount of damages proximately resulted from any occurrence which you find took place on June 11, 1958 as a result of the defendant's negligence. That is to say you must find that 'but for' the negligence of the defendant on June 11, 1958, the various complaints that the plaintiffs have, for which they seek damages, thereafter would not have occurred.

"You are further instructed that, since the question as to whether a given disability, subsequent injury, or subsequent medical expense was proximately caused by the claimed earlier injury requires medical proof, you must look for evidence of proximate causation solely in the testimony of physicians. If you find there is no medical testimony on the question of whether the claimed initial injury to the plaintiff caused the plaintiff to sustain any subsequent disability, injury or expense, then you may not award any damages to the plaintiffs for any subsequent disability, injury or expense."

In one of the early cases the Supreme Court of Michigan approved the instructions of the trial court, as amended. *Moore v. City of Kalamazoo*, 109 Mich. 176, 66 N.W. 1089. There the trial judge delivered the following instructions to the jury:

"It is contended that plaintiff's conduct in neglecting to care for her injury, and in failing for several weeks to call a surgeon, and in keeping about the house, in an effort to perform her ordinary work, aggravated her injury, and that much of the injury would have been avoided by proper care and treatment. Counsel for the defendant offered the following request, viz.: 'Defendant's Sixteenth Request: It was the duty of the plaintiff in this case after receiving her injury, if she received

> any, to use proper care and precaution, and the proper treatment, looking toward a recovery, and if she aggravated the alleged injury in any manner by her own acts, whether by being upon her feet and walking around or otherwise, the defendant would not be in any way responsible for that part or portion of the injury or suffering or loss of time caused by reason of conduct of the plaintiff herself.' The court gave this and added: 'You will understand this instruction, gentlemen, the same as the other, – *that if she did what a reasonably prudent person would have done under the same circumstances, then it would not be negligence on her part.* If she did what a reasonably prudent person would not have done, then it was negligence'." (Italics supplied)

In the case of *Weiting v. The Town of Ministon,* 77 Wis. 523, 46 N.W. 879, the Supreme Court of Wisconsin approved the following instructions of the trial court:

> "The plaintiff's attorney asks a special instruction with regards to the second breaking of the leg. The evidence shows that his leg was broken a second time after it so knit together that the man went around on crutches, and was at Neilsville. Now I have already instructed you that he is entitled to recover for his loss of damages which were occasioned by this accident upon the highway. Now this accident upon the highway broke his leg. The leg had knit together but was not entirely well, at the time of the second accident. *Now the law does not require that a man who has received such an injury shall lie upon his bed until his injuries are perfectly restored. He has a right to get upon his crutches, and to be out doors, and to ride in a wagon, as soon as it is reasonably safe and prudent for him to do so, and if by doing so, and another accident happens to him which would not have happened except for the first accident, the first would be the cause of the damages which he receives.*" (Italics supplied)

The appellant challenges the adequacy of the trial court's instruction on the law applicable to subsequent injuries. Appellant urges particularly that its "Requested Instruction No. 5" should have been granted as proffered. The record shows that the said instruction as proffered did not correctly state the law. Such portions of appellant's Requested Instructions as reflected the correct application of the law were covered

by the trial court's instructions to the jury. An analysis of Appellant's Requested Instruction No. 5, sought to have the jury instructed that the jury "must look for evidence of proximate causation solely in the testimony of physicians." Such request, of course, is contrary to the vast collection of authorities cited above in Appellees' Argument No. II. The trial court, at the very inception of its charge to the jury, fully acquainted the jury with the issues. The record shows the following proceedings:

> "This is an action for damages for personal injuries and expenses alleged to have been sustained by the female plaintiff.
>
> "The said female plaintiff alleges that on June 11, 1958, while shopping in the defendant's grocery store at Eighteenth and Hamlin Street, her right ankle struck a platform which she alleges was negligently placed in the aisle of the store by the defendant, and that as a consequence she fell over said platform and was injured.
>
> "She further alleges that a series of injuries which she alleges she suffered after that date are proximately the result of that fall in the defendant's store on June 11, 1958, and she seeks to recover damages therefor.
>
> "The male plaintiff claims damages for the alleged loss of his wife's consortium. Consortium will be explained in the instructions. He alleges that his loss resulted from the same injury which his wife, the female plaintiff, claims she suffered.
>
> "Defendant Safeway Store admits operating the store on June 11, 1958, but alleges that if the female plaintiff suffered any injuries on that date, or later, those injuries were not the result of any negligence of the Safeway Store but resulted from other causes.
>
> "The defendant denies that it was negligent in the maintenance of its store on June 11, 1958, and claims that if the female plaintiff was injured on that date in said store, it was caused by her own negligence in failing to exercise reasonable care to watch where she was going. That is, the defendant alleges that if the female plaintiff sustained any injury in its store on June 11, 1958, said injury was caused by the negligence or contributory negligence of the female plaintiff.
>
> "Defendant further alleges that any injuries which the female plaintiff may have sustained after that date,

> June 11, 1958, were not the proximate result of any accident which may have occurred in its store, but were the result of other causes. That is, defendant claims that if the female plaintiff did suffer personal injuries after June 11, 1958, they were not proximately related to any conduct of the Safeway Stores in June of 1958, but were the result of the negligence or contributory negligence of the female plaintiff."

The trial court's instruction on the questions of negligence and proximate cause, are set out in the counter-statement of the case, *supra*, and will not be reiterated here.

In stating the issues to be determined by the jury, the trial court gave them the following instructions:

> "The issues to be determined by you in this case are as follows:
>
> "First, was the defendant negligent on June 11, 1958? If you answer that question in the negative, that is, if you find that the defendant was not negligent, then you will return a verdict in favor of the defendant. If you answer that question in the affirmative; that is, if you find that the defendant was negligent, then you have a second issue to decide, namely, was that negligence the proximate cause of any injury to the female plaintiff.
>
> "If you answer that question in the negative, that is, if you find the defendant was negligent but that such negligence did not proximately cause the injury to the female plaintiff of which she complains, then neither plaintiff is entitled to recover, husband or wife.
>
> "If you answer in the affirmative, that is, if you find that the defendant was negligent, and that that negligence did proximately cause injury to the female plaintiff, then you must determine another issue, namely, whether the female plaintiff was guilty of contributory negligence, at that time.
>
> "If you find that the female plaintiff was guilty of contributory negligence while shopping in the defendant's store on June 11, 1958, then neither plaintiff is entitled to recover. In that event your verdict should be for the defendant.

> "If you find that there was negligence on the part of the defendant which proximately caused the female plaintiff to suffer injury on June 11, 1958, and that there was no contributory negligence on the female plaintiff's part, then the female plaintiff is entitled to recover from the defendant for any damages you find she has suffered as a proximate result of the negligence of the defendant on that date, June 11, 1958.
>
> "In the event you find the defendant liable to the female plaintiff, you should then fix the amount of damages to which you find her to be entitled."

The jury was fully instructed on the issue of contributory negligence. The instructions in this respect are set out in the counter-statement of the case, *supra*, and will not be repeated here.

An examination of the trial court's charge to the jury "in toto" reveals that all of the applicable law is fully covered and correctly stated.

Prayers for instructions which conclude with a direction to find a verdict for the party offering them must include every fact and circumstance in evidence that might justify an adverse conclusion and unless they are so included the offering party is not entitled to such instruction. U. S. Ex Rel., *Yturbide v. Metropolitan Club*, 11 App. D.C. 180; *Sullivan v. Capital Traction Co.*, 34 App. D.C. 358.

Where a trial court presents the case fully and fairly, in its charge to the jury, and nothing being said which tends to mislead them, either as to the law or the facts, the refusal to grant certain proffered instructions, even though correct in themselves, is not grounds for reversal. *Lippman v. Williams*, 79 U.S. App. D.C. 334, 147 F.2d 150, and *Madison v. White*, 60 App. D.C. 329, 54 F.2d 440.

## CONCLUSION

In the light of cases cited above, together with other authorities, and the record considered as a whole, the contention of appellant is without basis in law. This is especially true where the challenge relates to proximate cause of subsequent injuries.

Wherefore, the appellees urge affirmance of the judgments below.

Respectfully submitted,

BELFORD V. LAWSON, JR.

Suite 701 RCA Building
1725 K Street, N. W.
Washington, D. C. 20006

*Attorney for Appellees.*

*Of Counsel:*

LAWSON, REYNOLDS, NESBITT
& CHAIKIN